

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



ORIGINAL  
74-1688

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D/S

*To be argued by*  
IRVING J. ALTER

In The  
**United States Court of Appeals**  
For The Second Circuit

MAX ROBB as Trustee of the Estate of BOTANY  
INDUSTRIES, INC., Bankrupt,  
*Plaintiff-Appellee,*

vs.

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,  
*Defendant-Appellant.*

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**JOINT APPENDIX**

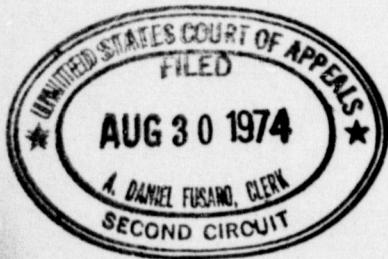
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WEIL, GOTSHAL & MANGES  
*Attorneys for Appellee*  
767 5th Avenue  
New York, New York 10022  
758-7800

JACOB SHEINKMAN  
ARTHUR M. GOLDBERG  
15 Union Square  
New York, New York 10003  
(212) 255-7800

SZOLD, BRANDWEN, MEYERS &  
ALTMAN  
30 Broad Street  
New York, New York 10004  
(212) 422-1777

*Attorneys for Defendant-Appellant*



(7506)

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**PAGINATION AS IN ORIGINAL COPY**

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DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE EDELSTEIN

71 CIV 2381

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BOTANY INDUSTRIES, INC.,

Plaintiff,

-against-

NEW YORK JOINT BOARD, AMALGAMATED CLOTHING  
WORKERS OF AMERICA,

Defendant.

---

Attorneys - For Plaintiff:

WEIL, GOTSHAL & MANGES  
767 Fifth Avenue  
New York, New York 10022 (212) 758-7800

For Defendant:

JACOB SHEINKMAN  
ARTHUR M. GOLDBERG  
15 Union Square  
New York, New York 10003 (212) 255-7800

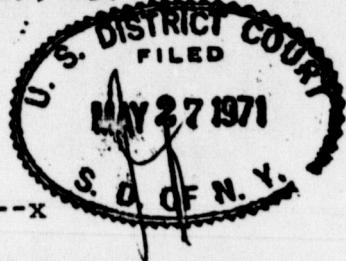
SZOLD, BRANDWEN, MEYERS & ALTMAN  
30 Broad Street  
New York, New York 10004 (212) 422-1777

## DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
May 27, 1971	Filed Affidavit and Notice of Motion
May 27, 1971	Filed Memorandum of Law in support of Plaintiffs Motion., to vacate arb. award.
May 27, 1971	Filed Notice of Assignment. J. Edelstein
June 7, 1971	Filed Defendants' Affidavit and Brief in opposition to motion to vacate
June 28, 1971	Filed Defendants' Notice of Motion to confirm arbitration award.
July 1, 1971	Filed Plaintiffs' Affidavit in Reply and answer to cross motion.
July 1, 1971	Filed Plaintiffs' Reply Memorandum.
April 12, 1974	Filed Opinion #40583. Accordingly the award of Arbitrator Gray is hereby vacated. Edelstein Ch. J. (mailed notice 5/8/74)
May 10, 1974	Filed Defs. Notice of Appeal from Opinion #40583 dated 4/12/74 (mailed notice).
May 10, 1974	Filed defts appearance of N.Y. Joint Board of Amalgamated Workers

PLAINTIFF'S AFFIDAVIT AND NOTICE OF MOTION TO VACATE  
ARBITRATION AWARD (Filed May 27, 1971) 3a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



BOTANY INDUSTRIES, INC.,

Plaintiff,

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

JUDGE *No.* **EDELSTEIN**  
*affidavit +*  
NOTICE OF MOTION

**71 CIV. 2381**

Defendant.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of CARL A. SCHWARZ, JR., verified May 21, 1971, and the exhibits referred to therein, a motion will be made to this Court at a motion part thereof to be held at the Federal Courthouse, Foley Square, in the city, county, and state of New York on June 8, 1971 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Title 9 USC and Rule 7 of the Federal Rules of Civil Procedure directing judgment pursuant to Title 9 USC entitled Arbitration and Section 301 of the Labor Management Relations Act of 1947, as amended, 29 USC 185, vacating the arbitration award of Herman A. Gray, verified February 23, 1971,

on the grounds that:

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1. Said award is in manifest disregard of Section 8(e) of the Labor Management Relations Act of 1947, as amended, 29 USC §158(e) in that it enforces an agreement which is void and unenforceable under said Act.

2. Said arbitrator exceeded his authority in making said award insofar as the award restricts the use, sale, further licensing or other disposition of the word "Botany" or any symbol or mark which contains the word "Botany".

3. Said arbitrator in manifest disregard of Section 7 of the National Labor Relations Act, as amended, 29 USC §157, by his award which enforces an agreement which deprives employees of their right to be represented by a union of their own choosing or to refrain from being so represented, and further;

ORDERING that judgment be entered declaring said award and the agreement dated November 1, 1966 between Botany Industries, Inc. and the New York Joint Board, Amalgamated Clothing Workers of America to which said arbitration award refers, void and unenforceable, and further,

ORDERING the defendants be stayed from proceeding in any way whatsoever to implement or

enforce said arbitration award and for such further relief as to the Court may seem just and proper together with the costs of this motion.

5a

Dated New York, New York  
May 21, 1971

WEIL, GOTSHAL & MANGES  
Attorneys for Botany  
Industries, Inc.

By Edward P. Wallace  
A Member of the Firm

Office and P. O. Address  
767 Fifth Avenue  
New York, New York 10022  
212 758-7800

To: Jacob Sheinkman, Esq.  
15 Union Square  
New York, New York 10003

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

6a

-----x  
BOTANY INDUSTRIES, INC.,

Plaintiff,

71 Civ.

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

AFFIDAVIT IN SUPPORT  
OF MOTION TO VACATE  
ARBITRATION AWARD

Defendant.

-----x  
CARL A. SCHWARZ, JR., being duly sworn,  
says:

1. I am a member of the Bar of this Court and associated with the firm of Weil, Gotshal & Manges, the attorneys of record for Plaintiff. I, rather than an officer of Plaintiff, am submitting this affidavit in support of Plaintiff's motion to vacate an award of Herman Gray, Esq. in an arbitration between it and Defendant since the matters related herein are for the most part technical, or within my personal knowledge, except where I specifically state such matters to be based upon information and belief.

2. This proceeding arises under 9 USC §6 and §10(d), entitled Arbitration. This Court has

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jurisdiction by virtue of Section 301 of the Labor  
Management Relations Act of 1947, as amended, 29 USC  
185 (hereinafter referred to as "LMRA").

3. Plaintiff, Botany Industries, Inc.  
("Botany") is a corporation whose wholly-owned  
subsidiary, Levinsohn Bros. & Co., Inc. ("Levinsohn")  
employs persons in the manufacture and distribution of  
boys', students' and junior clothing, an industry  
affecting commerce.

4. Botany is an employer within the  
meaning of Sections 2(2) and 301(a) LMRA, 29 USC §§152(2)  
and 185(a).

5. Both Levinsohn and Botany have a place  
of business in the County of New York, State of New  
York, within the territorial jurisdiction of this Court.

6. Defendant, New York Joint Board,  
Amalgamated Clothing Workers of America (the "Joint  
Board") is an unincorporated association in which  
employees participate and which exists for the purposes  
of dealing with employers concerning grievances, labor  
disputes, wages, rates of pay, hours of employment,  
and conditions of work.

7. The Joint Board represents employees  
in the clothing industry in the County of New York,

State of New York, an industry affecting commerce,  
and is a labor organization within the meaning of  
Sections 2(5) and 301 of L.M.R.A., 29 USC §§152(5) and  
185. 8a

8. I am informed and believe that on  
or about August 27, 1963, Botany licensed a New York  
corporation then known as Levinsohn Bros. & Co., Inc.  
to manufacture and sell boys' clothing within the  
territorial limits of the United States, and to use  
the name and trademark "Botany" on said products. A  
copy of this License Agreement is annexed and marked  
Exhibit 1.

9. At the time said License Agreement  
was entered into, Levinsohn Bros. & Co., Inc. was a  
party to a Collective Bargaining Agreement with the  
Joint Board by virtue of its membership in the New  
York Clothing Manufacturers Association, Inc., a  
trade association representing a multi-employer  
bargaining unit.

10. I am informed and believe that on  
or about July 1, 1966, Botany established a wholly  
owned subsidiary which became a successor corporation  
to Levinsohn Bros. & Co., Inc. and continued to operate

the business formerly conducted by that corporation. 9a  
Both corporations were known as Levinsohn Bros. & Co., Inc. All of the shares of the existing corporation were then acquired, and are now owned by Botany. Both Corporations were, and are, members of the New York Clothing Manufacturers Association, Inc.

11. I am informed and believe that on or about November 1, 1966, and in connection with the acquisition of the Levinsohn stock by Botany, the Joint Board required Michael Daroff, the Chairman of the Board and President of Botany to execute the Agreement annexed hereto and marked Exhibit 2, upon which the award herein sought to be vacated is based.

12. I am informed and believe that on June 1, 1968, the Collective Bargaining Agreement covering the employees of Levinsohn now in effect was negotiated by the New York Clothing Manufacturers Association, Inc. A copy of said Collective Bargaining Agreement is annexed and marked Exhibit 3.

13. Levinsohn has always continued since its acquisition by Botany, to manufacture boys', students', and junior clothing under the terms of its Licensing Agreement with Botany (Exhibit 1). Levinsohn

has always maintained and controlled independent labor 10a and employment policies. While Levinsohn and Botany have some common directors, Levinsohn is managed by an independent group of officers who are responsible for all manufacturing, sales, and operation of the clothing produced by Levinsohn. Botany, itself, does not sell or manufacture boys', students', or junior clothing, and does not itself, employ anyone manufacturing or selling such clothing.

14. Botany and Levinsohn are not part of an integrated process of production in the apparel and clothing industry. Levinsohn independently manufactures and produces clothing through its own integrated process. Levinsohn's connection with Botany is solely the fact that Botany is its parent corporation and some of its financial affairs are consolidated with the financial affairs of Botany.

15. By letter dated December 30, 1971, which is annexed and marked Exhibit 4, Herman Gray, Esq., the Arbitrator, appointed under the November 1, 1966 Agreement between Botany and the Joint Board (Exhibit 2) informed Botany that the Joint Board had requested a hearing before him.

16. By letter dated January 5, 1971, which is annexed and marked Exhibit 5, as attorney for Botany, questioned the reason for the

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hearing and the issues which the Joint Board wished determined, but agreed to attend at the time and place appointed by the Arbitrator.

17. At the hearing before Herman Gray on January 6, 1971, the Joint Board stated that it demanded an arbitration award in the nature of a declaratory judgment on the following issues:

1. That under paragraph numbered "1" of the Agreement of November 1, 1966, Botany was required to maintain a factory for the term of said Agreement, which expired on June 1, 1981 or the term of the Agreement between the Clothing Manufacturer's Association, Inc., and the Joint Board in effect as of June 1, 1981, whichever was later.

2. That for the same period of time Botany was restricted by the provisions of paragraph numbered "2" of the November 1, 1966 Agreement, from licensing the Botany label for the same type of garments made in New York by Levinsohn to anyone not in a contractual relationship with the Joint Board without first obtaining the Joint Board's prior written consent.

18. Paragraph numbered "1" of the November 1, 1966 Agreement recites as follows:

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"1. Botany agrees to continue to manufacture boys', students', and junior clothing in a manufacturing facility operated by Botany or on its behalf, by its own subsidiary, or by a company owned or controlled by it pursuant to the terms of a collective bargaining agreement with the Union."

19. Paragraph numbered "2" of the November 1, 1966 Agreement recites as follows:

"2. Botany further agrees that any and all boys', students', and junior clothing manufactured for and on its behalf shall only be manufactured in production facilities which are in contractual relations with the Union, and that Botany will not cause, directly or indirectly, any of such boys', students', and junior clothing to be manufactured in any other production facility which is not in contractual relations with the Union without first obtaining the prior written consent of the Union."

20. At the arbitration Botany contended that aforesaid paragraphs of the November 1, 1966 Agreement could only be construed as follows:

First, that by paragraph numbered "1", Botany guaranteed that so long as it or a subsidiary company controlled by it continued to manufacture certain boys', student and junior clothing, it was required to do so by means of a company under contract with the Union. Second, by paragraph numbered "2", that Botany could not

subcontract the work out to a shop which did not have a contract with the Union nor could it manufacture the goods at another company it owned or controlled if such company was not under contract with the Union. 13a

21. Botany maintained that any provision which prohibited it from dealing with "any manufacturer not in a contractual relationship with the Joint Board" amounted to a clear violation of Section 8(e) of the LMRA, and the Agreement of November 1, 1966 is not exempt from the provisions of 8(e) as within the so called "garment industry exemption".

22. Botany further contended that nowhere in paragraph numbered "2", which prohibits subcontracting, is there a restriction against licensing of Botany owned trademarks, and none can be implied. For an arbitrator to restrict the use of Botany's licensing right constitutes an abuse of the arbitrator's discretion and clearly exceeds the powers given him by the parties.

23. The Arbitrator, in his award which is annexed and marked Exhibit 6, refused to entertain Botany's contention that it would be a violation of the LMRA to require Botany to continue manufacturing

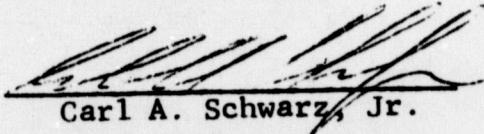
14a

'boys', students', and junior clothing through a manufacturer who was covered by a union contract with the New York Joint Board until 1981. The Arbitrator stated that the power to administer the Labor Act was vested exclusively in the Labor Board, and the contention that the November 1, 1966 Agreement was violative of the LMRA could not be entertained by him.

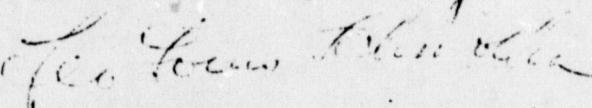
24. The Arbitrator in his award (Exhibit 6) stated that he had continuing jurisdiction under the November 1, 1966 agreement until it expired in 1981 and stated that the Joint Board could apply to him for such additional remedies as may be warranted from time to time. Since there is a likelihood that the Union may again resort to arbitration under the agreement that is being questioned, and has been given the right to do so by express provision in the award, it is requested that a restraining order be issued against the Union enjoining further proceedings before the Arbitrator.

WHEREFORE, Plaintiff, Botany Industries, Inc., prays that an order be entered by this Court vacating the arbitration award of Herman A.

Gray, verified February 23, 1971, and that the 15a  
Joint Board be restrained from proceeding in  
any way whatsoever to implement or enforce  
said arbitration award and for such further  
relief as to the Court may seem just and proper,  
together with the costs of this motion.

  
Carl A. Schwarz, Jr.

Subscribed and sworn to before  
me this 21<sup>st</sup> day of May 1971.



LEO LOUIS SCHMOLKA  
Notary Public, State of New York  
No. 60-3512300  
Qualified in Westchester County  
Commission Expires March 30, 1973

**EXHIBITS ANNEXED TO FOREGOING PLAINTIFF'S  
AFFIDAVIT AND NOTICE OF MOTION TO VACATE  
ARBITRATION AWARD**

~~PLAINTIFF'S EXHIBIT 1~~

This Agreement made this 27 day of ~~July~~, 1963, by  
and between Botany Industries, Inc., a New Jersey corporation  
(hereinafter called "Botany") and Levinsohn Bros. & Co., Inc., a  
New York corporation (hereinafter called "Manufacturer"),

WITNESSETH:

WHEREAS (A) Botany has for many years been engaged in  
the manufacture and sale of yarns, fabrics and wearing apparel  
advertised and sold under the name and trademark "Botany" which  
it owns, and by virtue of extensive advertising and adherence to  
the highest standards of production and merchandising, has made  
known to the public and has created and now enjoys an excellent  
reputation and widespread good will with respect to the style,  
quality and utility of its merchandise; and

(B) Manufacturer desires to obtain from Botany  
the license to use the trademark "Botany" in connection with the  
manufacture, marketing, sale and other commercialization of the  
product or products set forth below and Botany is willing to grant  
such license, all subject to the terms and conditions hereinafter  
contained;

NOW, THEREFORE, in consideration of the foregoing and of  
the mutual promises herein contained, the parties hereto agree as  
follows:

1. The Grant.

Subject to the terms and conditions set forth, effective  
November 9, 1965, Botany hereby grants to Manufacturer the exclusive  
right and license to manufacture and sell boys' suits, extra  
trousers for boys' suits, boys' sportcoats, boys' sportcoat  
and trouser combinations and boys' overcoats of the following  
styles and sizes:

<u>Style</u>	<u>Size</u>
Junior	4-12
Prep-Cadet	12-20
Student	34-40

(hereinafter referred to as "Botany Products") within the territorial  
limits of the United States and to use the name and trademark

17a

"Botany" on male products. Trousers for boys shall be sold by Manufacturer only (1) in conjunction with boys' suits to provide a second pair of trousers for such suits or (2) in conjunction with boys' sportcoats to make up sportcoat and trouser combinations, and not otherwise. Said "Botany" name and trademark may be used by Manufacturer only in connection with Botany Products licensed hereunder and manufactured and sold by Manufacturer pursuant to and in strict compliance with the terms and conditions of this Agreement. Expressly excluded from the license hereunder is Botany's unrestricted and unqualified right and privilege to manufacture and sell, or the right to license the manufacture and sale of Botany Products and articles not expressly and specifically included in the Manufacturer's license hereunder.

2. Royalties.

(a) Manufacturer will pay to Botany for the rights herein granted a royalty on all net sales of Botany Products computed as follows: (1) 1-1/2% on the first \$125,000 of net sales in each quarterly period; (2) 1% on all net sales beyond \$125,000 in such quarterly period. For the purpose of this Agreement, the quarterly periods shall be: June - August, September - November, December - February, March - May, all inclusive.

(b) In addition, Manufacturer will pay to Botany an annual minimum royalty payable on or before July 31 of each year in the amount of the excess of \$10,000 over the percentage royalty payable under the foregoing provisions with respect to the twelve months ended on the immediately preceding May 31.

(c) Percentage Royalty shall be paid by Manufacturer to Botany on a quarterly period basis and shall be computed at the end of each quarter with respect to the net sales by Manufacturer of Botany Products during that quarter. For all purposes under this Agreement, each unit of Botany Products shall be considered

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sold when it is shipped by Manufacturer. The quarterly payments shall be due within thirty (30) days after the end of each quarter. Any overpayment or underpayment of Percentage Royalty which may have been made in respect of any of the first three (3) quarters or the aggregate of any such quarters shall be adjusted on an annual accounting basis and such adjustment shall be made at the time the payment of Percentage Royalty is due on account of sales during the fourth quarter. In the event of termination of this Agreement for any reason, Manufacturer shall pay any unpaid Percentage Royalty with respect to the last complete quarter prior to termination at the same time as such payment would otherwise be due and, in addition, shall pay within thirty (30) days after termination Percentage Royalty with respect to all sales during the period from the end of the last complete quarter to the date of termination.

### 3. Quality Control.

The Botany Products manufactured and sold by Manufacturer shall be of good quality, workmanship and style and comparable to the general high standards of other products manufactured or sold under the trademark "Botany" by Botany or its licensees. Prior to any solicitation of orders for any Botany Products, Manufacturer shall submit a sample thereof to Botany. A further sample of each Botany Product shall be submitted to Botany any time when any change in quality, workmanship or style thereof is made, and at such other times as Botany may reasonably request. Botany shall have the right to examine at any time during reasonable business hours, by its representative or representatives, any and all Botany Products manufactured and sold by Manufacturer. If Botany should disapprove the quality, workmanship or style of any Botany Product, Manufacturer shall not sell or offer the disapproved product for sale under the "Botany" trademark, label or name.

4. Acknowledgment and Assumption of Liability Regarding Trademark.

(a) Botany represents, warrants and agrees that it is the exclusive owner of the trademark and trade name "Botany" registered in the United States Patent Office for men's and boys' clothing and other items and that said registered mark and name is valid and legally protectible against infringement. Botany will maintain registrations for men's and boys' clothing in full force and effect during the term hereof. Botany will defend any action or proceeding maintained against Manufacturer arising out of or based upon the invalidity of the trademark and trade name "Botany" in the United States of America, or any claim that such trademark infringes upon any other trademark or trade name in the United States; provided, however, that Botany shall be notified within fifteen (15) days after submission to Manufacturer of a claim against it or within ten (10) days after service of process on Manufacturer in a suit against it, and Botany shall have the option of defending any such suit by its own counsel. Nothing shall obligate Botany to protect said trademark and trade name or to defend any action or proceeding arising out of or based upon the invalidity of said trademark and trade name outside of the United States of America.

(b) Manufacturer hereby acknowledges and agrees that:

1. Botany is the exclusive owner of the trademark and trade name "Botany";
2. The said trademark and trade name is valid and legally protectible against use or infringement by others;
3. The trademark and trade name "Botany" is of great value throughout the United States and other portions of the world and Botany has spent large sums of money and devoted much time and effort in the promotion, development and advertising of

4. The consuming public now associates the trademark and trade name "Botany" with uniform products of consistent high quality sold under that mark and name;

5. The conditions, terms, restrictions, covenants and limitations of this Agreement are necessary, equitable, reasonable and essential:

(a) To maintain uniformity in the products sold under the trademark and trade name "Botany" and

(b) To insure to the consuming public that all goods sold under said trademark and trade name are of the same consistent high quality as sold by Botany and others who are or may hereafter be licensed to sell products under that trademark and trade name.

(c) Manufacturer acknowledges that the trademark and trade name "Botany" has become established among the consuming public as representing not only goods of high quality but also indicating that the outlets selling such goods are of high repute and integrity and follow high merchandising standards and further acknowledges that it is in the mutual interests of the parties hereto to protect and foster the value and consumer acceptance of the trademark. For this purpose Manufacturer agrees that it will sell Botany Products only to retail outlets of high repute and those which follow high standards of merchandising in the sale of the products licensed hereunder to the public and will not permit Botany Products to be sold either directly or indirectly to any store or for resale in any department of any store other than those which comply with the above requirements.

(d) To further implement the purposes set forth in Paragraph 4(c) of this Agreement, Manufacturer shall not sell Botany Products to any discount store, bargain store, supermarket, drug store or store of the type generally known as "Five and Ten Cent Stores", nor shall Manufacturer sell said Botany Products directly to any cut rate basement, bargain or discount department in any store, and Manufacturer shall take whatever action may be necessary or appropriate to insure against or enjoin the sale of any item of the Botany Products to any such source. Nothing contained in this paragraph shall prohibit a department store from closing out Botany Products in its bargain basement or discount department at the end of the season or at regular inventory close-out intervals in line with the regular merchandising policy utilized by such store; provided, however, that the provisions of paragraph 4(c) of this Agreement shall apply to any such sale and compliance therewith shall be a condition of such sale.

(e) Notwithstanding anything to the contrary contained in this Agreement, Manufacturer shall not permit any department store or any other store or outlet of any nature to publicize or advertise any close-out sales of Botany Products either within or outside of the store except that appropriate signs may be placed at the counters where such close-out sales are being conducted.

(f) If Manufacturer shall fail to take any action deemed appropriate by Botany immediately upon Botany's request to prevent any sale prohibited by Paragraphs 4(c) or (d) hereof or to prevent any advertising prohibited by paragraph 4(e) hereof, Manufacturer hereby irrevocably authorizes and empowers Botany to take such action in Manufacturer's name and Manufacturer shall pay to Botany upon demand the reasonable cost, including attorneys' fees, of taking that action.

E. Labeling, Packaging and Advertising.

(a) Manufacturer shall sell under the "Botany"

trademark only the Botany Products, each unit of which shall have affixed to it a label in form and design approved by Botany. Said label shall comply with all applicable statutes and with the rules and regulations promulgated by any governmental agency, and shall contain the trademark "Botany" and/or such other words, patterns or designs as Botany shall approve in writing.

(b) The trademark "Botany" shall be physically affixed and prominently displayed on the container, box or other package for each unit of the Botany Product manufactured or sold by Manufacturer pursuant to the terms hereof. Prior to the use by Manufacturer of any container, box or other package for the Botany Products, Manufacturer shall submit to Botany, for approval by it, the design and form thereof and the words, patterns or designs thereon and any change in any of the aforesaid shall be submitted to Botany for approval prior to use thereof by Manufacturer.

(c) During each year in which this Agreement is in effect Manufacturer agrees to engage in advertising and promoting Botany Products in newspapers, national magazines, trade papers, direct mail and advertising mats for retailers. All advertising and promotional activities, as to themes, media, standards, policies and otherwise, shall be handled in a dignified manner and in such a way as to be consistent with and enhance the general reputation and importance of the Botany trademark and trade name. Manufacturer shall keep Botany advised of its advertising and promotional activities and shall submit copies of advertisements and promotional materials to Botany upon request by it either prior to use or thereafter as Botany may request. If Botany shall in writing object to any item of advertising or promotional matter, Manufacturer will correct such item to conform with Botany's request.

**ONLY COPY AVAILABLE**

In addition thereto or in conjunction therewith, the same if so requested.

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6. Manufacturer's Duty, Efforts, Manufacture or Botany Products.

(a) Manufacturer shall use its best efforts to manufacture, market and sell the maximum quantity of Botany Products licensed hereunder, maintaining the standards of high quality and good workmanship and styling. Provided Manufacturer shall comply with the provisions and perform its obligations under this Agreement, during the term of this Agreement, Botany shall not manufacture nor grant to any other person, firm or corporation the right to manufacture and sell the Botany Products licensed hereunder nor authorize the use of the name and trademark "Botany" on such Botany Products within the territorial limits of the United States, it being understood that Botany retains its unqualified rights to the free and unrestricted use of the name and trademark "Botany" on all products of any description whatsoever other than Botany Products expressly specified in this Agreement.

(b) Manufacturer shall clearly indicate on all advertising material that Manufacturer is offering for sale Botany Products of student, cadet and junior sizes and not men's wear. It shall be the responsibility of Manufacturer to avoid the creation of confusion between the boys' wear manufactured and sold by it and products manufactured by or for and sold by H. Daroff & Sons, Inc., and Botany Brands, Inc. To effect the purposes of this subparagraph, Manufacturer shall take whatever steps may be appropriate, including but not limited to discontinuing sales of Botany Products to offending customers, to ensure that the advertising and promotional material employed by anyone selling Botany Products at retail shall not tend to create any confusion of the type referred to in the last preceding sentence.

(c) Except as specified by provision in Paragraph 11(b) of this Agreement, upon the termination of this Agreement, for any reason whatsoever, Manufacturer shall immediately cease to continue the manufacture, marketing, sale or advertising of Botany Products and thereafter will no longer use or have the right to use the trademark "Botany", or any variation thereof, or any other means of identification used by Botany, whether in trademark, names, designs or otherwise.

7. Maintenance of Records.

(a) Manufacturer agrees to keep true and accurate books and records in which there shall be reflected all sales of the Botany Products and all returns in connection therewith, complete inventory records of finished units of the Botany Products and the amount of Percentage Royalty payable to Botany hereunder in respect of net sales of the Botany Products. Manufacturer agrees to maintain such books and records for a period of six (6) years following the year to which they pertain.

(b) Manufacturer agrees to furnish to Botany within thirty (30) days from the end of each quarterly period during each year, a statement showing all sales of the Botany Products and all returns during the preceding quarter and a computation of the royalties payable hereunder in respect of such sales. At such time as its books and records shall be audited by a certified public accountant, but not less than annually, Manufacturer shall furnish to Botany a report certified by such certified public accountant covering the preceding yearly period and containing the same information required to be contained in the quarterly verified statements and also a statement of inventory of the Botany Products on hand at the beginning and end of each year.

(c) For the purpose of verifying the figures reported in any statement or report furnished to Botany hereunder, Botany

shall be entitled at any time, upon five (5) days' written notice to Manufacturer, to inspect any or all of the books and records which Manufacturer is required to maintain pursuant to Paragraph 7(a) of this Agreement. Such books of account and records shall be made available to Botany's representatives at Manufacturer's office where the same are customarily kept, and Manufacturer shall render all possible assistance to Botany and its representatives for the purpose of facilitating and checking the audit.

8. Assignments, Sub-licenses Prohibited.

(a) This Agreement may be assigned by Botany but shall not be assignable or transferable by Manufacturer without the prior written consent thereto by Botany and any assignment by Manufacturer without written consent shall constitute a default in the obligations of Manufacturer. For the purpose of this Agreement, a sale of an aggregate amount of twenty-five (25%) per cent or more of the capital stock of Manufacturer entitled to vote or of twenty-five (25%) per cent or more of the capital stock which may become entitled to vote, or any merger or consolidation or similar combination entered into by Manufacturer as a result of which the holders of the voting stock of Manufacturer hold less than seventy-five (75%) per cent of the voting stock of the surviving or new corporation shall constitute an assignment of this Agreement. Any consent to the assignment of this Agreement shall not relieve Manufacturer from its obligations and liabilities hereunder, unless Botany shall also expressly in writing agree to such relief. In the event of any assignment with consent, all references herein to Manufacturer shall mean both Manufacturer and its assignees and the assignees shall not be entitled to make any further assignment without the

(b) Manufacturer shall not grant to any person, firm, or corporation any sub-license, sub-contract or sub-franchise with respect to the use of the "Botany" trademark or trade name on any Botany Products or on any other products or merchandise whatsoever, unless it shall have obtained the prior written consent of Botany.

9. Representations and Indemnification.

(a) Nothing in this Agreement shall create a joint venture or establish the relationship of principal and agent or any other relationship of a similar nature between the parties. In all transactions regarding Botany Products, Manufacturer shall assume sole responsibility for any commitments, obligations or representations made in connection with the manufacture, sale, marketing or advertising thereof.

(b) With respect to manufacture, marketing, sale or advertising by Manufacturer of any Botany Products, Manufacturer agrees to save and hold Botany harmless, of and from any and all liabilities, claims, causes of action, suits, damages and expenses (including attorneys' fees) for which Botany may become liable or which it may incur or may be compelled to pay in any action or claim against Botany for or by reason of any acts, whether of omission or commission that may be suffered or committed by Manufacturer or any of its agents or employees, in Manufacturer's use of the "Botany" trademark or trade name (other

than actions for infringement of trademark rights, on the ground that said trademark is not valid) or for any other reason whatsoever. In lieu of the foregoing, Manufacturer shall have the right to substitute a surety company bond or insurance policy covering Botany in the respects aforesaid, provided, however, the same is, in the absolute discretion of Botany, satisfactory and adequate as to coverage, amount and insurer. 27a

10. Term of Agreement.

(a) Subject to the provisions for earlier cancellation and termination as hereinafter set forth, this Agreement shall operate for an initial term of five (5) years from November 9, 1965 and, by giving Botany written notice not less than nine (9) months prior to the end of the initial term, Manufacturer shall have the right at its option to renew this Agreement for an additional five (5) year term, provided it shall not have defaulted in any of its obligations hereunder. Upon the giving of such written notice and provided that Manufacturer shall not thereafter default in any of its obligations hereunder, this Agreement shall continue for an additional five (5) year term. Thereafter, Manufacturer shall have the right to renew this Agreement again for a third five (5) year term, subject to the same conditions applicable to the first renewal.

(b) In the event Manufacturer shall at any time default in the payment of any monies due hereunder or in any of the other terms or conditions hereof, Botany shall have the right to terminate this Agreement and the license hereby granted upon

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Fifteen (15) days' notice in writing, and such notice of termination shall become effective and final unless Manufacturer shall completely remedy the default within said fifteen (15) day period.

(c) In the event Manufacturer files a petition in bankruptcy or is adjudicated a bankrupt, or a petition in bankruptcy is filed against Manufacturer, or if it become insolvent or makes an assignment for the benefit of creditors, or if Manufacturer discontinues its business, or if a Receiver is appointed for it or its business, Botany shall have the right to terminate this Agreement at any time after the happening of any of such events by giving written notice of termination to Manufacturer; thereupon this Agreement shall terminate on the tenth (10th) day after such notice of termination is given.

(d) In the event, in any year of this Agreement, the total net sales of Botany Products is less than One Million (\$1,000,000) Dollars, Botany shall have the right at its option to cancel and terminate this Agreement and the license granted hereunder at the end of the succeeding year by giving Manufacturer at least three (3) months' prior written notice to that effect, and upon the giving of such notice, this Agreement and the license granted hereunder shall terminate at the end of such succeeding year.

(e) No failure or delay on the part of Botany to exercise its right of termination hereunder for any one or more causes shall be considered to prejudice its right of termination for such or for any other or subsequent cause. Upon termination of this Agreement, all Percentage Royalty on sales of Botany Products shall become due and payable as provided for in Paragraph 2 above. Termination or cancellation of this Agreement for any reason whatsoever shall not relieve Manufacturer from its obligations

arising prior to termination or from its liability to pay to Botany all monies theretofore or thereafter payable hereunder.

11. Cessation of Use of Name and Trademark.

(a) In the event a notice of termination is given by Botany pursuant to the provisions hereof, Manufacturer shall furnish to Botany within ten (10) days after receipt of notice of termination a statement showing the number and description of all Botany Products on hand. Botany shall have the absolute right, in its discretion, to purchase from Manufacturer all Botany Products listed on the said statement at a purchase price equal to Manufacturer's list price less fifty (50%) per cent.

(b) Upon termination of this Agreement by Botany, if Botany shall not exercise its option to purchase the Botany Products as provided in subparagraph (a) above, Manufacturer shall have the right to sell the Botany Products on hand under the "Botany" trademark for a period of not more than three (3) months after such termination. Sales pursuant to the last preceding sentence shall be permitted only in event of termination by Botany and, subsequent to such three (3) month period, Manufacturer shall not sell any Botany Products bearing the "Botany" name, label and/or trademark. Manufacturer shall pay to Botany the Percentage Royalty provided for in paragraph 2(a) above on all net sales of Botany Products made by Manufacturer during said three (3) month period, and Manufacturer shall be bound by all of the terms and provisions of this Agreement so long as it shall continue to sell any Botany Products.

(c) After expiration or termination of this Agreement, Manufacturer shall not manufacture, sell, market or advertise any Botany Products under the "Botany" name, label and/or trademark except in accordance with the provisions of this paragraph 11.

13. Notices and Warnings.

30a

(a) All notices and other communications which are required or which may be given under the provisions of this Agreement shall be in writing and shall be mailed by registered or certified mail, postage prepaid, if to Botany, addressed to it at

Sperry Rand Building (Room 1370)  
1290 Avenue of the Americas  
New York 19, New York

with a copy to

WOLF, BLOCK, SCHORR and SOLIS-COHEN  
Twelfth Floor Packard Building  
Philadelphia 2, Pennsylvania

and if to Manufacturer, addressed to it at

79 Fifth Avenue  
New York, New York

All notices and communications shall be effective upon the date on which they are received by the party to which they are required or permitted to be given. Either party may change its address by written notice to that effect given to the other party in accordance with this subparagraph.

(b) This contract sets forth the entire Agreement and understanding between the parties and may not be orally changed, altered, modified or amended in any respect. To effect any change, modification, alteration or amendment, the same must be in writing, signed by the parties hereto and approved in writing by Botany.

(c) In the event that Manufacturer should breach or violate any of the covenants contained in this Agreement, Botany shall be entitled to exercise any right or remedy available to it either at law or in equity. Such rights and remedies shall include but shall not be limited to termination of this Agreement, damages and injunctive relief. The remedies of any

rights or remedy available to Botany shall not preclude the concurrent or subsequent exercise by it of any other right or remedy and all rights and remedies shall be cumulative.

(d) No waiver by either party, whether express or implied, of any provision of this Agreement or of any breach or default of any party, shall constitute a continuing waiver of such provision or any other provisions of this Agreement, and no such waiver by any party shall prevent such party from enforcing any and all provisions of this Agreement or from acting upon the same or any subsequent breach or default of the other party of any provisions of this Agreement.

(e) This Agreement shall be binding upon and enure to the benefit of the successors and assigns of Botany, but shall not enure to the benefit of the successors or assigns of Manufacturer without the prior written consent of Botany.

(f) This Agreement is executed and delivered within the State of New York and it is expressly agreed that it shall be construed in accordance with the laws of the State of New York.

(g) The titles set forth in this Agreement are for convenience only and shall not be considered as part of the Agreement in any respect nor shall they in any way affect the substance of any provision contained in this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers

and their corporate seals affixed the day and year first above  
written.

BOTANY INDUSTRIES, INC.

By: H. M. Wink  
President

Attest: P. A. P. P.  
Secretary

(Corporate Seal)

LEVINSON BROS. & CO., INC.

By: Bernard Levin  
President

Attest: Sydney Levinson  
Secretary

(Corporate Seal)

AGREEMENT dated this 1st day of November, 1966, by and between BOTANY INDUSTRIES, INC. (hereinafter referred to as "Botany") and the NEW YORK JOINT BOARD OF THE AMALGAMATED CLOTHING WORKERS OF AMERICA (hereinafter referred to as the "Union").

W I T N E S S E T H:

WHEREAS the Union is and has been in contractual relations with Levinsohn Bros. & Co., a manufacturer of boys', students' and junior clothing, obligating it, among other things, to manufacture or cause to be manufactured, the said clothing in its own production facility and only in production facilities under contract with the Union; and

WHEREAS the boys', students' and junior clothing manufactured or caused to be manufactured by the said Levinsohn Bros. & Co. has been manufactured pursuant to an exclusive licence agreement with Botany, by skilled union craftsmen operating under a collective bargaining agreement with the Union in a manufacturing facility owned and/or operated by Levinsohn Bros. & Co.; and

WHEREAS Botany has purchased Levinsohn Bros. & Co.; and

WHEREAS Botany desires to continue to have such boys', students' and junior clothing manufactured by it and on its behalf by skilled union craftsmen operating under a collective bargaining agreement with the Union and in a manufacturing facility owned or controlled by it;

NOW, THEREFORE, in consideration of the premises herein contained, the parties hereto agree as follows:

1. Botany agrees to continue to manufacture boys', students' and junior clothing in a manufacturing facility operated by Botany or on its behalf, by its own subsidiary, or by a company owned or controlled by it pursuant to the terms of a collective bargaining agreement with the Union.

2. Botany further agrees that any and all boys', students' and junior clothing manufactured for and on its behalf shall only be manufactured in production facilities which are in contractual relations with the Union, and that Botany will not cause, directly or indirectly, any of such boys', students' and junior clothing to be manufactured in any other production facility which is not in contractual relations with the Union without first obtaining the prior written consent of the Union.

3. Any controversy or claim arising out of or relating, directly or indirectly, to the provisions of this Agreement, or the interpretation and performance thereof, shall be settled by arbitration. The Arbitrator named in the agreement between the Union and the New York Clothing Manufacturers' Association, Inc., its successor or assign, is hereby designated as the Arbitrator under this Agreement. Such arbitration shall be held in the City of New York, in accordance with the laws of the State of New York. The parties hereto consent that any papers, notices or processes, including subpoenae, necessary or appropriate to initiate or conduct an arbitration hereunder, or to enforce or to confirm an award, may be served by certified mail directed to the last known address of the parties. The parties further consent that the Arbitrator is empowered to issue an award providing for mandatory direction, prohibition, order and/or money damages, and that the decision, order, direction or award of the Arbitrator shall be final, conclusive, binding and enforceable in a court of competent jurisdiction.

4. This Agreement shall be binding upon the parties hereto, their successors and assigns.

5. This Agreement shall be effective upon the date hereof, and shall continue in full force until June 1, 1981, or the term

of the agreement between the Clothing Manufacturers Association, Inc., its successor or assign, and the Union, in effect as of June 1, 1981, whichever is later.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on their behalf by their respective duly authorized agents, effective as of the day and year first above written.

BOTANY INDUSTRIES, INC.

By Michael Duroff

NEW YORK JOINT BOARD OF THE  
AMALGAMATED CLOTHING WORKERS  
OF AMERICA

By Henry M. Goldfarb

King David Lopatin

**Market Agreement**

**between**

**NEW YORK CLOTHING MANUFACTURERS'  
ASSOCIATION, INC.**

**and**

**AMALGAMATED CLOTHING WORKERS OF AMERICA**

**and**

**NEW YORK JOINT BOARD**

**DATED AS OF JUNE 1, 1968**

John Levinson

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**AGREEMENT** made as of the 1st day of June, 1968, between the NEW YORK CLOTHING MANUFACTURERS' ASSOCIATION, INC., on behalf of itself and each of its members, and their successors and assigns, hereinafter collectively referred to as the "Association" (a member of the "Association" being hereinafter referred to as the "Manufacturer" or the "Employer") and the AMALGAMATED CLOTHING WORKERS OF AMERICA and the NEW YORK JOINT BOARD OF THE AMALGAMATED CLOTHING WORKERS OF AMERICA (hereinafter collectively referred to as the "Union").

WHEREAS the Association is a member of the Clothing Manufacturers Association of the United States of America, and

WHEREAS the Clothing Manufacturers Association of the United States of America has entered into a collective bargaining agreement with the Amalgamated Clothing Workers of America dated as of the 1st day of June, 1968, and

WHEREAS the parties hereto desire to incorporate the provisions of said agreement with the additions contained herein in this local market agreement,

Now, THEREFORE, in consideration of the mutual covenants, promises and agreements herein contained, the parties hereto agree as follows:

## I.

### COVERAGE:

A. The term "employee" when used in this Agreement includes all of the employees of the Manufacturer engaged in the cutting, pattern cutting, joker sewing in the cutting room, making and shipping of clothing, all miscellaneous and auxiliary employees employed in connection therewith and office and clerical employees, but shall exclude executives, supervisory employees and confidential secretaries of the principal executives of the Manufacturer. Where the Manufacturer employs five (5) or less office and clerical employees, not more than one (1) may be classified as a confidential secretary, and not more than one (1) may be classified as an accountant.

B. The term "clothing" as used in this Agreement includes men's, boys' and children's suits, overcoats and topcoats, knee pants, single pants, slacks, mackinaws, reversibles, finger tips, leisure coats and sportswear and all other articles of men's and boys' wearing apparel.

## II.

### UNION RECOGNITION:

- (a) The Employer recognizes the Union as the exclusive collective bargaining agent for his employees with reference to wages, hours and working conditions.
- (b) The Employer shall recognize and deal with such representatives of the employees as the Union may elect or appoint and shall permit such representatives elected or appointed by the Union to visit his plant at any time during working hours in accordance with existing rules.
- (c) The Employer agrees to make available to the Union such payroll and production records as the Union may reasonably require as the collective bargaining agent and/or contracting party hereunder.

## III.

### TRIAL PERIOD:

All new experienced production employees shall have a trial period of two (2) weeks. All new inexperienced production employees and all new office and clerical employees shall have a trial period of six (6) weeks.

## IV.

### UNION SECURITY:

A. Membership in the Union on completion of the trial period or on and after the 30th day following the execution of this Agreement, whichever is later, shall be required as a condition of employment of each employee. In the event the trial period is less than thirty (30) days, membership in the Union shall not be required until the 30th day following the date of employment.

**B. All employees who are now members or hereafter become members of the Union shall, as a condition of continued employment, remain members in good standing during the term of this Agreement.**

**C. Where the Union maintains an employment office, such employment office shall be made available to both members and non-members of the Union. The Union warrants that in the operation of such an office and in referrals to the Employer, it shall not discriminate against any individual applicant for employment because of non-membership in the Union. Where the Union maintains such an office, the Employer agrees that in the event he shall require additional employees, he shall hire such additional employees from the aforesaid employment office. The Employer retains the right to reject any applicant referred by the Union. In the event that the aforesaid employment office is unable to supply the requested employees within two (2) working days following the request, the Employer shall be free to hire such additional employees in the open market. Notices of the provisions relating to the functioning of the hiring arrangement shall be posted by the Employer where notices to employees and applicants for employment are customarily posted and by the Union.**

**D. A Manufacturer who employs contractors shall employ only contractors who are in contractual relationship with the New York Joint Board of the Amalgamated Clothing Workers of America and shall not cause or permit any work to be performed for him, directly or indirectly, by any person, partnership, corporation or contractor who is not in contractual relationship with the New York Joint Board except by mutual agreement of the Association and the New York Joint Board.**

**E. In the carting of clothing to and from contractors the Manufacturer shall employ or hire only such truckmen as are in contractual relationship with a union recognized by the New York Joint Board of the Amalgamated Clothing Workers of America.**

**F. All canvas coat fronts and shoulder pads used by the Manufacturer shall be made in shops which are in contractual relationship with the New York Joint Board and shall bear the Union label.**

## WAGES:

A. 1. *Time Rate Employees:*

(a) Effective June 3, 1968 the Employer shall grant a wage increase of twenty-five cents (25¢) per hour to all time rate employees; and a wage increase of twenty-seven and eight-tenths cents (27.8¢) per hour to cutting room employees employed on a thirty-six hour week.

(b) Effective June 2, 1969 the Employer shall grant a wage increase of seventeen and one half cents (17.5¢) per hour to all time rate employees; and a wage increase of nineteen and four-tenths cents (19.4¢) to cutting room employees employed on a thirty-six hour week.

(c) Effective June 1, 1970 the Employer shall grant a wage increase of fifteen cents (15¢) per hour to all time rate employees; and a wage increase of sixteen and seven-tenths cents (16.7¢) to cutting room employees employed on a thirty-six hour week.

2. *Piece Rate Employees:*

(a) Effective June 3, 1968 the Employer shall incorporate into all existing piece rates a wage increase of twenty-five cents (25¢) per hour for all piece rate employees;

(b) Effective June 2, 1969 the Employer shall incorporate into all existing piece rates a wage increase of seventeen and one-half cents (17.5¢) per hour for all piece rate employees;

(c) Effective June 1, 1970 the Employer shall incorporate into all existing piece rates a wage increase of fifteen cents (15¢) per hour for all piece rate employees.

## 3. The procedure for translating the wage increase into the piece rates shall be as follows:

*Step 1*—Determine the weighted straight time average hourly earnings of each section for the four busiest consecutive weeks which are

being used in determining the first week's vacation pay for the 1968, 1969 or 1970 vacation period, as applicable.

**Step 2**—Divide the appropriate amount by the weighted average hourly earnings as calculated in Step 1. The result is the percentage increase by which the piece rates in effect in such section must be increased.

**B. Wages** shall be paid in accordance with the schedule of wage rates as hereinabove adjusted except that such schedule may be modified as expressly provided in this Agreement.

**C. Except** as otherwise provided in subparagraph D hereof, in the event that any of the operations of the Employer are changed or new operations are added, piece rates for such operations shall be mutually agreed upon between the Union and the Employer and shall become effective as of the time that such operation is changed or new operation begun. The new piece rates shall maintain the average earnings of the employees prevailing at the time that the operation is changed or new operation begun.

**D. Anything** to the contrary herein notwithstanding, the Employer shall recognize and abide by specifications and grades generally prevailing in the clothing industry. Any change in such specifications affecting grades shall be effective only when mutually agreed upon by the Employer and the General Executive Board of the Amalgamated Clothing Workers of America.

**E. If** an employee is temporarily transferred from one job or operation to another at the request of the Employer, he shall, while working on the job or operation to which he has been transferred, be paid his average earnings prevailing at the time of the transfer. The conditions to apply upon permanent transfer shall be mutually agreed upon by the Employer and the Union at the time of such transfer.

**F. The Manufacturer** shall have an equal voice with the Union in fixing the piece rate of each operation, provided the total labor cost of

the garment has been previously agreed upon between the Manufacturer and the Union. Either the Union or the Manufacturer shall have the right upon ten (10) days' notice in writing given to the other to take up the question of heights affecting the cutters. Such demand shall be promptly taken up by the Association with the representatives of the Union. Such heights as may then be agreed upon between the Association and the Union shall be binding upon the Manufacturer and the Union.

G. The minimum wage of all office and clerical employees covered by this Agreement shall be mutually agreed upon by the parties hereto.

H. Employees of manufacturers of single pants shall receive the wage increases as provided in Schedule A annexed hereto.

## VI.

### HOURS OF WORK:

(a) *Regular Work Week:* The regular hours of work for all employees (except office and clerical employees) shall be eight (8) hours in any one day, from Monday to Friday inclusive. The time when work shall begin and end each day shall be agreed upon by the Employer and the Union. The thirty-six (36) hour week for all manufacturing operations in which it has been heretofore established shall be maintained.

The regular hours of work for office and clerical employees shall be forty (40) hours per week to be worked on five (5) days from Monday to Friday inclusive. Where it has been the established practice during the period beginning with the day after Labor Day and ending on the last Saturday in May for office and clerical workers to work the forty (40) hours in six (6) days, from Monday to Saturday inclusive during some or all of such period, such practice may be continued and such hours shall be considered the regular hours of work.

(b) *Overtime:* Time and one-half shall be paid for all work outside the regular daily hours. No work shall be performed on a Saturday except by mutual agreement of the parties. Time and one-half shall be paid for all work performed on Saturdays irrespective of the number of hours worked during the week. Saturday overtime provisions shall not apply to office and clerical workers whose regular work week includes Saturday. No work shall be performed on a designated holiday except by mutual agreement of the parties and, if agreed upon, at double time. Overtime pay for work on a designated holiday shall be in addition to holiday pay to which the employee is entitled pursuant to the paragraph dealing with holidays.

(c) *Notice of Overtime:* The Employer agrees to give reasonable notice to the employees and the appropriate union shop committee representative when overtime is to be worked.

## VII.

### SIDNEY HILLMAN HEALTH CENTER:

Contributions shall be made to the Sidney Hillman Health Center as provided in Supplement A attached.

## VIII.

### VACATIONS AND HOLIDAYS:

Vacations and holidays shall be granted to employees as provided in Supplement A attached. In the event that the Employer now has vacation or holiday practices more favorable to the employees than those provided for in Supplement A, such more favorable practices shall be continued.

## IX.

### EQUAL DIVISION OF WORK:

During any slack season or whenever there is insufficient work, the available work shall be divided, insofar as is practicable, equally among all regular employees of the Manufacturer and among his registered contractors. This Paragraph shall not apply to office and clerical employees and label sewers.

## X.

## LAYOFF:

In the event that the business needs of the Manufacturer reasonably require a reduction in its force of office and clerical employees or label sewers, such employees shall be laid off in inverse order of their seniority in the department in which the layoff is required, employees with the shortest period of service being the first laid off. Seniority shall likewise be observed in rehiring after a layoff.

## XI.

## PAYMENT OF WAGES AND CHECKOFF:

A. The Employer agrees that he shall pay his employees on a prescribed day in each week.

B. The Employer shall deduct from the wages of the employees, upon written authorization of the employees, Union dues, initiation fees and assessments. The amounts deducted pursuant to such authorization shall be transmitted monthly to the properly designated official of the Union, together with a list of names of the employees from whom the deductions were made, on forms to be provided by the Union. Sums deducted by the Employer as union dues, initiation fees or assessments shall be kept separate and apart from the general funds of the Employer and shall be deemed trust funds.

## XII.

## INSURANCE:

A. The employer agrees to contribute sums of money equal to a stated percentage of his payroll to the Amalgamated Insurance Fund (social insurance and retirement), all as provided in Supplement B annexed hereto, the terms and provisions of said Supplement B being specifically incorporated herein by reference.

B. The Manufacturer shall pay weekly to the New York Clothing Unemployment Fund Agency 7.6% of the billed price of all cloth-

ing manufactured for him by New York contractors, and 7% of the billed price of all clothing manufactured for him by New Jersey contractors, said sums to be used by the Agency to pay the contributions payable to the Amalgamated Insurance Fund (social insurance and retirement) on the said contractors' payrolls.

### XIII.

#### UNION LABEL:

The Employer agrees to affix copies of the label of the Amalgamated Clothing Workers of America to clothing, including clothing manufactured by registered Union contractors in behalf of the Employer, all as provided in Supplement C annexed hereto, the terms and provisions of said Supplement C being specifically incorporated herein by reference.

### XIV.

#### MILITARY SERVICE:

In the event that an employee enlists or is conscripted into the Armed Forces of the United States of America or is called into service as a member of the National Guard or Army, Navy or Marine Corps Reserves, he shall, upon his discharge from service, be reinstated with all his rights and privileges enjoyed by him at the time he entered service; provided, that he shall request such reinstatement within the period fixed by law and provided that the Employer shall have the right to discharge any person whom it hired by reason of the entry into military service of the person to be reinstated.

### XV.

#### OTHER FACTORIES:

A. During the term of this Agreement the Employer agrees that he shall not, without the consent of the New York Joint Board, remove or cause to be removed his present plant or plants from the city or cities in which such plant or plants are located.

B. During the term of this Agreement the Employer shall not, without the consent of the New York Joint Board, manufacture garments or cause them to be manufactured in a factory other than his present factory or factories.

## XVI.

### HOMEWORK:

None of the Employer's work may be performed in the homes of the employees.

## XVII.

### CHILD LABOR:

No Manufacturer shall employ any children under the age of eighteen (18) years in any shop owned by him or in which clothing is manufactured for him.

## XVIII.

### DISCHARGES:

No employee covered by this Agreement shall be discharged without just cause. The Union shall present all complaints of discharge without just cause to the Employer within two (2) working days after the discharge. If the complaint cannot be adjusted by mutual consent, it shall forthwith be submitted to the Impartial Chairman hereinafter designated in this Agreement for determination pursuant to the procedure provided. The Impartial Chairman shall issue his decision and award within seven (7) days from the conclusion of the hearing of the discharge in dispute. If the Impartial Chairman finds that the employee was discharged without just cause, he shall order reinstatement and may require the payment of back pay in such amount as, in his judgment, the circumstances warrant. This paragraph shall not apply to an employee during his trial period.

## XIX.

## GRIEVANCE AND ARBITRATION PROCEDURE:

Any complaint, grievance or dispute arising under, out of or relating directly or indirectly to the provisions of this Agreement, or the interpretation or performance thereof, shall, in the first instance, be taken up for adjustment by a representative of the Union and a representative of the Employer. Should they fail to agree, the matter, including a dispute concerning the interpretation or application of the arbitration provision, shall be referred for arbitration and final determination to the Impartial Chairman of the New York men's and boys' clothing industry to be designated by the Association and the Union. Any complaint, grievance or dispute including a dispute concerning the interpretation or application of the arbitration provision between a Manufacturer and a contractor relating to work sent to the contractor by the Manufacturer shall be referred for arbitration and final determination to the said Impartial Chairman. Honorable Herman A. Gray is hereby designated as Impartial Chairman for the duration of this Agreement or until his successor is named.

The decision, order, direction, or award of the Impartial Chairman shall be final, conclusive and binding and enforceable in a court of competent jurisdiction.

In addition to the powers which the Impartial Chairman may possess pursuant to this Agreement or by operation of law, it is expressly agreed that in the event of any breach or threatened breach of this Agreement, the Impartial Chairman may issue an award providing for a mandatory direction, prohibition, order, or money damages. Without limitation upon the foregoing, if members of the Union have been injured by a violation of this Agreement, the direction, prohibition, order or money damages equal to the earnings of which the Union members were deprived may be made to run in favor of the Union.

The parties consent that any papers, notices or process, including subpoenas, necessary or appropriate to initiate or continue an arbitration hereunder or to enforce or confirm an award, may be served by ordinary mail directed to the last known address of the parties or their

attorneys. The service of any other notice that may be required under the Civil Practice Law and Rules is hereby waived.

The parties consent that all arbitration hearings shall be heard at the office of the Impartial Chairman located at 100 Fifth Avenue in the City of New York, or at such other place as the Impartial Chairman may designate.

Any party or his representative may call such arbitration hearing on giving five (5) days' notice to all of the interested parties. The Impartial Chairman, however, may call a hearing on such notice as he deems appropriate.

The parties hereby expressly agree that the oath of the arbitrator is waived and consent that the Impartial Chairman may proceed with the hearing on this submission.

In the event a party to arbitration shall default in appearing before the Impartial Chairman, the latter is empowered to take the proof of the party appearing and render an award thereon.

In the event of any controversy, the Manufacturer's manufacturing books, vouchers, papers and records shall be available for inspection by duly authorized representatives of the Impartial Chairman, to be examined to determine amount of goods cut or being cut, made or being made, by or for the Manufacturer, and to ascertain the names and addresses of the persons doing such work, and to determine generally whether there is compliance with the terms of this Agreement.

The parties agree that a judgment may be entered upon the award of the Impartial Chairman on application of either party.

The laws of the State of New York shall apply in the construction of this Agreement and its enforcement and, except as provided otherwise herein, the provisions of the Civil Practice Law and Rules of the State of New York shall be applicable in any arbitration proceeding.

The procedure established in this Agreement for the adjustment of disputes shall be the exclusive means for the determination of such disputes, including strikes, stoppages, lockouts and any and all claims,

demands and acts arising therefrom, except as expressly provided otherwise in this Agreement. No proceeding or action in a court of law or equity or administrative tribunal shall be initiated other than to compel arbitration or to enforce awards. This Paragraph shall constitute a complete defense and ground for a stay of any action or proceeding instituted contrary thereto.

X.

**STOPPAGES AND LOCKOUTS:**

A. The Manufacturer and the Union agree that there shall be no stoppages or lockouts during the term of this Agreement. The Impartial Chairman shall have the power to impose appropriate discipline for a violation of this provision. If a stoppage or lockout occurs the aggrieved party shall have the right to demand an immediate hearing before the Impartial Chairman on four (4) hours' notice.

B. Anything contained in subparagraph A to the contrary notwithstanding:

(1) In the event that a Manufacturer violates this Agreement by employing Union contractors who are not registered by him as required by this Agreement, the Union shall be free to order a stoppage of such Manufacturer's work in the shop of such unregistered contractor.

(2) In the event that the Manufacturer violates this Agreement by employing a non-union contractor, the Union shall be free to take such action, including stoppages, as it deems appropriate to require the Manufacturer to cease employing non-union contractors.

(3) In the event that either party fails to comply with the decision or award of the Impartial Chairman within ten (10) days after service of a copy thereof, the other party shall be immediately free to call a strike, stoppage or lockout, as the case may be.

## XXI.

## REGISTRATION OF CONTRACTORS:

A. Contemporaneously with the execution of this Agreement, the Manufacturer shall execute a registration statement which is hereby made a part of this Agreement and in which the Manufacturer, among other things, shall register the names of all contractors to be employed by him and the grades and labor cost of the garments to be made by such contractors. The Manufacturer shall re-register all contractors registered by him immediately prior to the execution of this Agreement, unless the Union consents to a change. The principle of registration shall apply to contractors as well as to Manufacturers.

B. The Manufacturer shall employ only such contractors as are registered on his registration statement and shall comply with all of the terms and conditions provided in such registration statement. No change shall be made in the contractors registered by the Manufacturer, either by the release or addition of contractors, without the mutual written consent of the parties, and if they cannot agree, the question shall be submitted to the Impartial Chairman pursuant to Paragraph XIX.

C. The Manufacturer shall employ only such contractors as he reasonably requires to perform his work. Work in contract shops registered by more than one manufacturer shall be performed in the order of the date of its receipt by the contractor.

D. The Manufacturer shall be responsible for the performance of all of the terms of this Agreement, whether the work is performed by him in his own shop or for him in the shop of a contractor.

E. Whenever the contractor shall fail to pay his employees on the usual weekly pay day (which must be at least once each week), the Shop Chairman and Shop Committee shall at once give notice thereof to the Union and the Association and, unless arrangements are made by the representatives of the Association and the Union with respect to the continuance of the work, shall at once cause the workers to cease

work. The wages due to the workers for the week immediately preceding such notice shall be paid to the Union by the Manufacturer, or, if the work has been performed for more than one Manufacturer, by each Manufacturer pro rata.

## XXII.

### SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE:

A. The Manufacturer shall pay weekly into the New York Clothing Unemployment Fund Agency 6.96% of the agreed billed price of the clothing manufactured for him in New York contract shops, and 8.04% of the agreed billed price of the clothing manufactured for him in New Jersey contract shops, together with any assessments or penalties and interest levied by the State or Federal Governments because of delinquency in payment by the Manufacturer. The sums paid to the Agency shall, after the payment of administrative expenses, be used by the Agency to pay Federal Unemployment and Social Security taxes and State Unemployment Insurance taxes. The amount to be paid by the Manufacturer to the Agency shall be subject to adjustment by the Impartial Chairman to the extent necessary to comply with any changes in the Federal or State laws relating to Social Security and Unemployment Insurance taxes. The Agency shall establish such rules and regulations relating to collection and distribution of monies paid to it under this Paragraph as it may deem necessary.

B. In order to provide unemployment insurance coverage for all employees it is agreed that all manufacturers who are not obligated to comply with the New York Unemployment Insurance Law or the New Jersey Unemployment Insurance Law shall immediately become voluntarily covered under the New York Unemployment Insurance Law and the New Jersey Unemployment Insurance Law, as the case may be, and shall continue such coverage during the term of this Agreement. In the event any such Manufacturer fails to obtain such coverage, he shall be liable for the payment of unemployment insurance benefits to each of his employees covered by this Agreement who become unemployed, the amount of such benefits to be the same as the

employee would have received had the Manufacturer been covered by the unemployment insurance law. In the event of any disagreement as to the amount of such benefits, the matter shall be determined by the Impartial Chairman pursuant to the provisions of Paragraph XIX hereof.

### XXIII.

#### OBLIGATIONS OF THE EMPLOYER:

A. Notwithstanding the resignation, suspension or expulsion of any member of the Association, the obligations of this Agreement shall remain in full force and effect, and shall be binding upon such member for the full term thereof.

B. Unless the written consent of the New York Joint Board has first been obtained, no Employer and no person who now is or becomes an officer, substantial stockholder, director or partner of any Employer during the term of this Agreement shall become, directly or indirectly, interested in any clothing establishment or a subsidiary or affiliate thereof operating as manufacturing jobber, manufacturing wholesaler, manufacturing retailer, or contractor which is not in contractual relationship with the New York Joint Board. Such consent shall not be unreasonably withheld. In the event that the New York Joint Board refuses to give its consent after a request therefor, the Manufacturer or the person making such request may present the matter as a grievance to the Impartial Chairman for his decision. For the purpose of enforcing this sub-paragraph B the arbitration provisions of this Agreement shall apply to each officer, substantial stockholder, director or partner of the Employer individually without limitation upon the applicability of the said arbitration provisions.

C. In the event that a Manufacturer goes out of business, such a Manufacturer shall, upon cessation, pay to and on behalf of its employees all liabilities provided under this Agreement which have accrued and are unpaid, including vacation payments as herein provided in an amount pro-rated for the period since the last vacation.

## XXIV.

## MORE FAVORABLE PRACTICES:

Any custom or practice existing in the plant of an Employer at the time of the execution of this Agreement more favorable to the employees than the provisions hereof shall be continued as heretofore.

## XXV.

## ABSENTEEISM:

The Union and the Manufacturer recognize the evil of absenteeism. It is therefore agreed that joint employer and union committees be set up in the market to cooperate in a joint effort to reduce absenteeism.

## XXVI.

## PROHIBITION OF CUT, MAKE AND TRIM:

The Manufacturer agrees that it shall not send out work for cut, make and trim.

## XXVII.

## INTRODUCTION OF TECHNOLOGICAL CHANGES, ETC.:

The Union has long cooperated with employers in the introduction of new machinery, changes in manufacturing techniques, and technological improvement in clothing plants. This policy has been established by mutual agreement, generally on a market level, between the Employer and the Union. Underlying such agreement has been the recognition of these basic conditions: grades as provided in Article V(D) of this Agreement, wages of the affected workers were not to be reduced, and workers were not to be thrown out of employment. Such policy is reaffirmed and shall continue to be dependent, preferably by mutual agreement on a market level except that should a particular change have substantial repercussions in the clothing industry generally, the assent of the General Executive Board shall be required.

Subject to the foregoing conditions, the scope of the general arbitration clause shall remain in full force and effect and applicable to all covered by this Agreement.

## XXVIII.

## TIME OFF TO VOTE:

Notwithstanding any other provision hereof, employees who have heretofore received two hours time off to vote on Election Day shall be allowed time off to vote on Election Day only in conformity with the Election Law of New York as amended.

## XXIX.

## NON-DISCRIMINATION:

It is the continuing policy of the Employer and the Union that the provisions of this Agreement shall be applied to all employees or applicants for employment without regard to race, color, religious creed or national origin.

## XXX.

## SEPARABILITY CLAUSE:

Should any part or provision of this Agreement be rendered or declared illegal or an unfair labor practice by reason of any existing or subsequently enacted legislation or by any decree of a court of competent jurisdiction or by the decision of any authorized government agency, such invalidation of such part or provision shall not invalidate the remainder thereof, provided, however, upon such invalidation, the parties agree immediately to meet and negotiate substitute provisions for such parts or provisions rendered or declared illegal or an unfair labor practice.

## XXXI.

## TERM OF AGREEMENT:

This Agreement shall be binding upon the parties hereto and their successors in interest and shall be effective upon the date hereof and shall remain in full force and effect until June 1, 1971. It shall be automatically renewed from year to year thereafter unless on or before February 1, 1971 or February 1st of any year thereafter notice in writing, by certified mail, is given by either the Association or the Union to the other of desire to propose changes in this Agreement or of intention to terminate the same, in either of which events this Agreement shall terminate upon the ensuing June 1st.

IN WITNESS WHEREOF, the parties hereto have caused their signatures to be affixed the day and year hereinabove first written.

NEW YORK CLOTHING MANUFACTURERS'  
ASSOCIATION, INC.

By .....  
HERMAN SOIFER  
President

By .....  
WM. P. GOLDMAN  
Treasurer

By .....

AMALGAMATED CLOTHING WORKERS OF  
AMERICA

By *Louis Hollander*  
LOUIS HOLLANDER

.....  
VINCENT LACAPRIA

NEW YORK JOINT BOARD OF THE  
AMALGAMATED CLOTHING WORKERS OF  
AMERICA

By .....  
LOUIS HOLLANDER

By .....  
VINCENT LACAPRIA

.....  
Accepted by:

**SUPPLEMENT A****VACATIONS, HOLIDAYS AND HEALTH CENTER****I.**

The following provisions shall apply to all employees including employees of exclusive contractors but shall not apply to (1) office and clerical employees and (2) employees of contractors other than exclusive contractors:

**A. VACATIONS:****1. Vacation Period.**

It is mutually agreed that there shall be the following vacation periods for employees entitled to vacation pay as hereinafter provided:

(a) The Summer Vacation Period, which shall be the first two (2) consecutive weeks of July, the first to be the week in which July 4th falls in each year, unless the Employer and the Union shall mutually agree upon some other two (2) consecutive weeks during the summer months, and

(b) The Christmas Vacation Period, which shall be the week in which Christmas Day falls in each year.

(c) In the event that a paid holiday falls within a vacation period, employees entitled to holiday pay shall be entitled to such holiday pay in addition to vacation pay hereinafter provided. If the Employer shuts down his plant for vacation purposes, those employees who are not entitled to vacation pay or who are not entitled to vacation pay for the entire period of the shutdown shall be considered on a lay-off status for the period during which they do not receive vacation pay.

**2. Eligibility and Pay.****(a) For the Summer Vacation Period.**

(1) All employees who have been on the payroll of the Employer for at least six (6) months prior to the commencement of the Summer

Vacation Period, and, except as hereinafter provided, who are on such payroll at the commencement of the Summer Vacation Period are eligible for a paid Summer Vacation. An employee otherwise eligible for a paid Summer Vacation shall not be deemed ineligible because of the fact that he is temporarily laid off or ill at the commencement of the Summer Vacation Period. The Impartial Chairman is expressly empowered to determine in accordance with the arbitration procedure provided in this Agreement whether an employee, discharged prior to the commencement of a Summer Vacation Period but otherwise eligible for a paid Summer Vacation, shall be entitled to Summer Vacation pay.

(2) The amount of each employee's Summer Vacation pay shall be determined in the manner set forth in this Sub-paragraph. If the employee has been on the payroll of the Employer:

- (i) Six (6) months but less than nine (9) months, he shall receive one-half of one week's pay;
- (ii) Nine (9) months but less than one (1) year, he shall receive three-fourths of one week's pay;
- (iii) One year or more, he shall receive two (2) week's pay.

(3) (i) First Week: In the case of the hourly and weekly employees, one week's Summer Vacation Pay shall be the employee's current regular weekly rate. In the case of piece work employees, one week's Summer Vacation pay shall be forty (40) times the individual employee's straight time average hourly earnings for the four (4) consecutive busiest weeks of the Summer Vacation year. If an employee did not work in each of said four (4) weeks, his Summer Vacation pay shall be forty (40) times his straight time average hourly earnings for the four (4) busiest consecutive weeks of the vacation year in which he did work all four (4) weeks.

(ii) Second Week: An eligible employee who has worked not less than 1200 hours in the 12 months beginning June 1st in the previous calendar year and ending May 31st in the current vacation year shall receive for his second week's vacation pay the same amount as the employee's vacation pay for the first week.

For eligible employees who worked less than 1200 hours during the entire aforesaid twelve (12) months period, the second week's vacation pay shall be two and one-half per cent (2½%) of the employee's straight time earnings in the twelve (12) months beginning June 1st in the previous calendar year and ending May 31st in the current vacation year.

(b) For the Christmas Vacation Period.

(1) All employees who have been on the payroll of the Employer one year or more prior to December 1st and except as hereinafter provided, who are on such payroll at the commencement of the Christmas vacation period are eligible for a paid Christmas vacation. An employee otherwise eligible for a paid Christmas Vacation shall not be deemed ineligible because of the fact that he is temporarily laid off or ill at the commencement of the Christmas Vacation Period. The Impartial Chairman is expressly empowered to determine in accordance with the arbitration procedure provided in this Agreement whether an employee, discharged prior to the commencement of a Christmas Vacation Period but otherwise eligible for a paid Christmas Vacation, shall be entitled to Christmas Vacation pay.

(2) The amount of each employee's vacation pay for the Christmas vacation period shall be determined in the manner set forth in this sub-paragraph.

(i) an employee who has worked not less than 1200 hours in the entire aforesaid twelve (12) months period,

(a) if an hourly or weekly employee, he shall receive his current rate less one-half the wage increase, if any, paid on June 1st of the current vacation year,

(b) if a piece worker employee, he shall receive forty (40) times his straight time average hourly earnings for the four (4) consecutive busiest weeks of the current vacation year, beginning December 1st in the previous calendar year and ending November 30th in the current vacation year which average hourly earnings shall be adjusted by

one-half of the wage increase, if any, paid on June 1st of the current vacation year.

(ii) an employee who worked less than 1200 hours in the entire aforesaid twelve (12) months period shall receive two and one-half percent (2½%) of his straight time earnings in the twelve (12) months beginning December 1st in the previous calendar year and ending November 30th in the current vacation year.

*3. Time of Payment.*

Vacation pay as hereinabove provided shall be paid on the pay day immediately preceding the vacation period. An employee who has been in the employ of the Employer a sufficient length of time to have earned vacations as herein set forth, but whose employment has been terminated because of termination of business or the closing of a plant shall be entitled to vacation pay prorated as of the date of termination of employment.

4. It is agreed that for the 1968 Summer Vacation, vacation pay for the second week shall be calculated and paid in accordance with previous practice.

**B. HOLIDAYS:**

1. (a) All employees shall be entitled to the following seven holidays with pay: New Year's Day, Washington's Birthday, Memorial Day, July 4th, Labor Day, Thanksgiving Day and Christmas Day.

(b) Should any of these holidays fall on a Sunday, the day celebrated as such shall be considered the holiday. New Year's Day, Washington's Birthday, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day shall be paid for irrespective of the day of the week in which the holiday falls.

2. In the case of hourly and weekly employees the pay for each holiday shall be one-fifth (1/5) of the employee's current regular weekly rate. In the case of piece workers the employee's pay for each

holiday shall be eight (8) times the employee's straight time average hourly earnings as such earnings were computed for the purpose of determining the first week's vacation pay for the vacation period immediately preceding such holiday.

3. Notwithstanding the provisions of this Paragraph, it is understood that holiday pay shall not be paid any employees if the Employer's factory is shut down in all his manufacturing departments for five (5) consecutive weeks as follows:

- (a) The entire two (2) weeks immediately preceding the week in which such paid holiday occurs; and
- (b) The entire week during which such paid holiday occurs; and
- (c) The entire two (2) weeks immediately following the week in which such paid holiday occurs.

4. Any worker who is absent from work without reasonable excuse on the work day before or the work day after a holiday shall not be entitled to holiday pay.

**C. SIDNEY HILLMAN HEALTH CENTER:**

The manufacturer agrees to contribute five-sixteenths of one per cent (5/16 of 1%) of the payroll monthly to the Sidney Hillman Health Center, Inc., said monies to be used to provide health and medical services to the employees, subject to such rules and regulations as the said Health Center may adopt.

**II.**

The following provisions shall apply to office and clerical employees:

**A. VACATIONS:**

1. All office and clerical employees who are on the payroll at the commencement of the Summer vacation period as defined in Sub-

division I of the Supplement shall receive the following vacation with pay in the Summer vacation period:

If employed six (6) months but less than one (1) year prior to the commencement of the vacation period, one (1) week's vacation with pay;

If employed one (1) year or over prior to the commencement of the vacation period, two (2) weeks' vacation with pay.

2. All office and clerical employees who have been on the payroll of the Employer one (1) year or more prior to December 1st, and who have not quit their employment between December 1st and the commencement of the Christmas Vacation period as defined in Subdivision I of this Supplement shall receive one (1) week's vacation with pay in the Christmas Vacation period.

**B. HOLIDAYS:**

All office and clerical employees shall receive the following holidays with pay:

New Year's Day	July 4th
Washington's Birthday	Labor Day
Decoration Day	Thanksgiving Day
	Christmas,

and such other holidays as the Manufacturer has customarily observed by closing its office.

**C. SIDNEY HILLMAN HEALTH CENTER:**

The Manufacturer agrees to contribute monthly to the Sidney Hillman Health Center, Inc. five-sixteenths of one per cent (5/16 of 1%) of the payroll of office and clerical employees who, the Union advises, have joined the Sidney Hillman Health Center, Inc., said contribution to be used to provide health and medical services subject to such rules and regulations as the said Health Center may adopt.

## III.

The following provisions shall apply to employees of contractors other than exclusive contractors:

**A. The Fund:**

1. The fund heretofore known as the "New York Joint Board Vacation, Holiday and Health Center Fund" has been renamed the "New York Joint Board Vacation Holiday and Health Center Fund" (herein called the "Fund") and is hereby continued.

2. Each manufacturer shall pay into the Fund a sum equal to 7.96% of the contract price of all garments manufactured for him by contractors (other than exclusive contractors) for the purpose of providing funds to pay vacation and holiday pay to employees of such contractors. The foregoing rates shall be subject to redetermination by agreement of the New York Joint Board and the Association, or by the Impartial Chairman, for subsequent years of this agreement. Payments shall be made weekly on the basis of contractors' bills submitted during the preceding week.

3. The Fund shall be organized and administered as follows:

(a) The Fund shall be received, held and administered by a committee consisting of six (6) representatives of the New York Joint Board designated by it, five (5) representatives of the Manufacturers designated by the Association, and one (1) representative of the Greater Clothing Contractors Association designated by said Association. The Committee may make all necessary and appropriate rules and regulations for its government, not inconsistent with the provisions of this agreement. In the event of any disagreement the matter shall be submitted to the Impartial Chairman as any other dispute hereunder.

(b) The monies paid into the Fund pursuant to Subparagraph 2 hereof during each 12 months period ending June 1st of each year shall be used and applied by the Committee for the following purposes:

(1) To pay or provide for the payment of the cost of administering the Fund during such 12 months period.

(2) To pay or provide for the payment of holiday pay for seven (7) holidays as designated in this agreement falling within such 12 months period to employees of contractors (other than exclusive contractors), in such amounts and in accordance with such eligibility requirements as the committee may determine.

(3) To pay or provide for the payment of vacation pay for the employees of contractors (other than exclusive contractors), in such amounts and in accordance with such eligibility requirements as the committee may determine.

(4) To set up adequate reserves at such times and in such amounts as the Committee may determine.

(5) If a surplus remains after paying or providing for the payment of the items referred to in clauses (1), (2), (3) and (4), such surplus may be distributed among the contributing manufacturers at such times and in such amounts as the Committee may determine.

(c) Neither the Manufacturer nor the Union shall have any right, title or interest in or to the Fund or any part thereof, except the right of a manufacturer to his pro rata share of the surplus, if any, declared by the committee pursuant to clause (4) of sub-paragraph (b), nor shall any employee employed by contractors have any right, title or interest under the provisions of this supplement against any manufacturer or contractor, the manufacturer's payments to the Fund, or in or to the Fund itself or any part thereof, except the right of an eligible employee to vacation and holiday pay as determined by the committee.

#### IV.

The question of providing vacation benefits to non permanent cutters and shipping clerks shall be studied by a committee consisting of three representatives designated by the Union and three representatives designated by the Association.

In the event that the committee has not reached an agreement by August 1, 1968, unless the time is extended by mutual consent of the parties, the matter shall be submitted for decision by the Impartial Chairman. Any agreement reached or decision by the Impartial Chairman shall become effective as of June 3, 1968 and any such agreement or decision shall be deemed incorporated in the agreement.

**SUPPLEMENT B**

**Amalgamated Insurance Fund  
Insurance & Retirement**

**SUPPLEMENTAL AGREEMENT** dated as of June 1, 1968, between  
(herein called the "Employer") and  
of the AMALGAMATED CLOTHING WORKERS OF  
AMERICA (herein called the "Union").

**WITNESSETH:**

WHEREAS, the Employer and the Union have executed a Collective Bargaining Agreement (herein called the "Collective Bargaining Agreement") which is now in full force and effect, and

WHEREAS, the Employer has agreed to contribute sums of money equal to a stated percentage of its payroll to a fund or funds to be used to provide pensions or other retirement benefits, life, medical care, hospitalization, accident and health insurance, and other insurance benefits, to employees employed in the men's and boys' clothing industry, including medical care and hospitalization for the families of such employees and an educational assistance program for eligible children of such employees, and to execute a supplemental agreement in the form of this Supplemental Agreement providing for such contributions, and the application thereof, and

WHEREAS, the Employer has heretofore entered into one or more prior supplemental agreements with the Union for the purpose of providing funds for certain of the above described benefits, and

WHEREAS, it is the intention that this Supplemental Agreement shall supersede all prior supplemental agreements from and after June 1, 1968;

Now, THEREFORE, in consideration of the premises the Union and the Employer agree that the Collective Bargaining Agreement shall be supplemented as follows:

1. Definitions:

(a) The term "employees of the Employer" as used in this Supplemental Agreement means all of the employees of the Employer within the collective bargaining unit fixed by the Collective Bargaining Agreement, including employees during their trial period.

2. This Supplemental Agreement shall supersede all prior supplemental agreements from and after September 30, 1968; provided, however, that all sums of money paid or payable by the Employer under any prior supplemental agreement to the Trustees designated in one or more Agreements and Declarations of Trust which accompanied, and were made part of, said prior supplemental agreements (insofar as any part of such sums of money so paid to said Trustees have not been expended or applied by said Trustees in accordance with the provisions of said prior supplemental agreements and prior agreements and declarations of trust) shall be applied by the said Trustees to the purposes set forth and provided for in said prior supplemental agreements and agreements and declarations of trust, and subject to the provisions therein contained.

3. A. Commencing on the pay day for the week of June 3, 1968, and weekly thereafter until September 30, 1968, the Employer shall pay to the Trustees nine and one half (9½%) per cent of the gross wages payable for each pay period to all the employees of the Employer. Except as provided in and subject to the provisions of Paragraph IC of the said Agreement and Declaration of Trust, the said 9½% of gross wages shall be credited to the Retirement Fund and to the Social Insurance Fund as follows:

(i) 5.4% of gross wages shall be credited to the Retirement Fund,

(ii) 4.1% of gross wages shall be credited to the Social Insurance Fund,

(iii) The term "gross wages" means all of the wages of the Employee as defined in paragraph (a) hereof including cost of living bonuses but excluding vacation and holiday pay.

B. Commencing on the pay day for the week of September 30, 1968, and weekly thereafter, the Employer shall pay to the Trustees (hereinafter called "Trustees") designated under an Agreement and Declaration of Trust, as most recently amended as of June 1, 1968, the terms and provisions of which Agreement and Declaration of Trust are herein specifically incorporated by reference, eight and seven-tenths per cent (8.7%) of the gross wages payable for each period to all the employees of the Employer. Except as provided in and subject to the provisions of Paragraphs 1C and 1D of the said Agreement and Declaration of Trust, the said 8.7% of gross wages shall be credited to the Retirement Fund and to the Social Insurance Fund as follows:

(a) 4.5% of gross wages shall be credited to the Retirement Fund,

(b) 4.2% of gross wages shall be credited to the Social Insurance Fund,

(c) The term "gross wages" means all of the wages of the employees (as defined in subparagraph (a) hereof) including cost of living bonuses, and vacation and holiday pay.

C. All of the foregoing sums shall be administered and expended by the Trustees pursuant to the provisions of the said Agreement and Declaration of Trust as amended as of June 1, 1968, for the purpose of providing benefits upon their retirement, and life, accident and health insurance, and such other forms of group insurance for medical care and hospitalization as the Trustees may reasonably determine, to employees employed by the Employer, and employees employed by other Employers, including affiliates of the Amalgamated Clothing Workers of America (herein called the "Amalgamated"), for whom contributions are made to the Amalgamated Insurance Fund in the amounts set forth in this Paragraph, all of whom are members of the group

embraced within the general plan in the men's and boys' clothing industry, and also to provide medical care and hospitalization for the families of such employees, and educational assistance for the eligible children of such employees.

4. The Employer shall furnish to the Trustees, upon request, such information and reports as they may require in the performance of their duties under any of the agreements and declarations of trust. The Trustees, or any authorized agent or representative of the Trustees, shall have the right at all reasonable times during business hours to enter upon the premises of the Employer and to examine and copy such of the books, records, papers and reports of the Employer as may be necessary to permit the Trustees to determine whether the Employer is fully complying with the provisions of Paragraph 3 hereof.

5. No employee or member of his family shall have the option to receive instead of the benefits provided for by any of the agreements and declarations of trust any part of the contributions of the Employer. No employee or member of his family shall have the right to assign any benefits to which he may be or become entitled under any of the agreements and declarations of trust or to receive a cash consideration in lieu of such benefits either upon termination of the trust therein created, or through severance of employment or otherwise.

6. During the term of this Supplemental Agreement the Union obligates itself to enter into no contract or agreement whereby any employer engaged in the men's and boys' clothing industry will not be obligated to pay the amount required to be paid to the Trustees as set forth in Paragraph 3 hereof to provide the benefits herein set forth. During the term of this Supplemental Agreement the Union agrees to insert a clause in all of its collective bargaining agreements with Employers engaged in the men's and boys' clothing industry, to the effect that the Employer shall pay to the Trustees under the Agreement and Declaration of Trust, as amended, the sums set forth in Paragraph 3 hereof (as the same may from time to time be modified according to the terms hereof), to be applied under the Agreement and Declaration of Trust, as amended. This Paragraph may be waived

as to one or more Employers by an instrument in writing executed by the Clothing Manufacturers Association of the United States of America and the Amalgamated and approved by the Board of Directors of the Clothing Manufacturers Association of the United States of America and the General Executive Board of the Amalgamated. With respect to Employers who are under the jurisdiction of the Chicago Joint Board of the Amalgamated, this Paragraph may be complied with by executing the Chicago Supplemental Agreement referred to in the aforementioned Agreement and Declaration of Trust.

7. (A) This Supplemental Agreement and the Collective Bargaining Agreement and the Agreement and Declaration of Trust shall be construed as a single document, and all of the provisions of the Collective Bargaining Agreement relating to the administration and enforcement thereof shall apply to the administration and enforcement of this Supplemental Agreement, provided however that any controversy, claim, complaint, grievance or dispute between the parties hereto arising out of or relating to the provisions of this Supplemental Agreement or the interpretation, breach, application or performance thereof, shall be referred by the Union, the Trustees or the Employer for arbitration and determination as hereinafter provided:

(1) If, by the terms of the Collective Bargaining Agreement, a named individual, or his designee, is designated as the Arbitrator thereunder, such named individual or his designee is hereby designated as the Arbitrator under this Supplemental Agreement.

(2) In the event the Collective Bargaining Agreement does not designate a named individual as the Arbitrator, then the Arbitrator shall be designated in writing by the Employer and the Union. If the Employer and Union cannot agree on the Arbitrator, he shall be appointed forthwith by the American Arbitration Association on the application of the Union or the Employer or the Trustees.

(3) The powers of the Arbitrator and the procedures for Arbitration hereunder shall be as hereinafter provided. The decision, order, direction, award or action of the Arbitrator shall be

final, conclusive, binding and enforceable in a court of competent jurisdiction.

In addition to the power which the Arbitrator may possess pursuant to the within Supplemental Agreement or by operation of law, in the event of any breach or threatened breach of this Supplemental Agreement, the Arbitrator, after a hearing, may issue an award providing for a mandatory direction or prohibition.

The parties consent that any papers, notices or processes, including subpoenas, necessary or appropriate to initiate or continue an arbitration hereunder to enforce, confirm, vacate or modify an award, may be served by certified mail directed to the last known address of the Employer, the Union and the Trustees.

The Union or the Employer or the Trustees may call such arbitration hearing by giving (5) days notice by certified mail or two (2) days notice by telegram to the other parties. The Arbitrator, however, if he deems it appropriate, may call a hearing on shorter notice. The parties consent that arbitration hearings shall be heard at such place as the Arbitrator may designate.

The parties agree that the oath of the Arbitrator is waived and consent that he may proceed with the hearing on the submission. In the event a party to arbitration should default in appearing before the Arbitrator, the Arbitrator is hereby empowered to take the proof of the party or parties appearing and render an award thereon.

The Employer's pertinent books, vouchers, papers and records shall be available for examination by duly authorized representatives of the Arbitrator to determine whether there is full compliance with the terms of this Supplemental Agreement.

(B) In the event that the Union receives written notice from one or more of the Trustees designated by the Trustees for that purpose, that the Employer has failed to pay in full any sum due the Trustees under paragraph 3 hereof and that such failure has continued for five (5) days, the Union may direct its members to discontinue work in the

plant of the Employer and to discontinue work upon clothing being manufactured for the Employer by contractors until all sums due from the Employer under paragraph 3 hereof have been paid in full. The remedy provided for in this subparagraph shall be in addition to all other remedies available to the Union and to the Trustees and may be exercised by the Union, anything in the Collective Bargaining Agreement to the contrary notwithstanding. Payment by the Employer under protest shall be without prejudice to his right to contest the correctness of the Trustees' demand.

(C) The Trustees, in their own names as Trustees, may also institute or intervene in any proceeding at law, in equity or in bankruptcy for the purpose of effectuating the collection of any sums due to them from the Employer under the provisions of paragraph 3 hereof.

8. In the event that legislation is enacted by the Federal Government levying a tax or other exaction upon the Employer for the purpose of establishing a federally administered system of life, health, accident, medical care or hospitalization insurance under which the employees of the Employer are insured, the Employer shall be credited against the sums payable under paragraph 3 hereof for each pay period, with the amount of such tax or exaction, payable by him for such pay period, provided that the amount of such credit shall in no event exceed the amount required to be paid at that time to provide the benefits other than retirement.

The Health Insurance for the Aged Act (known as Medicare) as enacted on July 30, 1965, is not legislation within the scope of this paragraph, and the Employer is not entitled to any credit against the sums payable under paragraph 3 hereof for any payments made to support the programs and/or benefits provided for in the said Act.

9. The provisions of this Supplemental Agreement shall remain in full force and effect for the full term of the Collective Bargaining Agreement and of any extensions or renewals thereof, but shall terminate and come to an end with the Collective Bargaining Agreement or any extension or renewal thereof, or prior thereto by an instru-

ment in writing executed by the Clothing Manufacturers Association of the United States of America and the Amalgamated and approved by the Board of Directors of the Clothing Manufacturers Association of the United States of America and the General Executive Board of the Amalgamated.

10. The primary purpose of this Supplemental Agreement and the said Agreement and Declaration of Trust being to provide a practical plan for benefits upon their retirement, and life, accident and health insurance, and other benefits for employees and their families as herein and therein provided, it is understood that the form of the plan, and of this Supplemental Agreement and of the Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction; such interpretation or construction shall be placed on this Supplemental Agreement, and the Agreement and Declaration of Trust as will assist in the functioning of the plan, for the benefit of employees, and their families, regardless of form.

11. In no event will the Employer be entitled to the return of any part of any contribution made hereunder.

12. Regardless of the date on which the within Supplemental Agreement shall be executed, the within Supplemental Agreement shall be effective as of September 30, 1968 with the same force and effect as if it had been actually executed on that date.

13. Neither the execution of this Supplemental Agreement nor any provision herein contained, or contained in any other agreement affecting the same, shall be deemed to release the Employer from any contribution or contributions provided for in any prior supplemental agreement or agreements, and which have become due and payable to the Trustees referred to in any such supplemental agreement or agreements, and not yet paid to such Trustees.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Agreement to be executed by their duly authorized representatives as of the day and year first above written.

.....  
Employer

By .....

.....  
Title

NEW YORK JOINT BOARD of the  
AMALGAMATED CLOTHING WORKERS OF AMERICA

By .....

.....  
Title

Address of Employer:

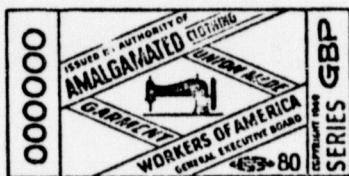
.....  
Street

.....  
City and State

## SUPPLEMENT C

**LICENSE AGREEMENT** made as of the      day of      , 196   , between NEW YORK JOINT BOARD of the AMALGAMATED CLOTHING WORKERS OF AMERICA (hereinafter called the "Licensor") and/or the AMALGAMATED CLOTHING WORKERS OF AMERICA, 15 Union Square, New York, New York (herein called the "Amalgamated"), and the EMPLOYER (herein called the "Licensee").

WHEREAS, the Amalgamated, a labor organization, has designed, adopted, copyrighted and registered and is now the owner of labels for the identification of men's and boys' clothing which is the product of the labor of its members, a facsimile of which is as follows:



The foregoing labels are herein referred to severally as the "suit label", "garment label" and the "trouser label" and collectively as the "labels"; and

WHEREAS, the Amalgamated has authorized the Licensor, if any, to enter into this License Agreement; and

WHEREAS, the Licensee, a manufacturer of men's and/or boys' clothing, is in contractual relations with the Licensor and/or the Amalgamated under a collective bargaining agreement in which the Licensee has agreed to affix copies of the labels to men's and boys' clothing manufactured by the Licensee to identify such clothing as the product of members of the Amalgamated and to meet the demand of the consuming public,

Now, THEREFORE, the Licensor and/or the Amalgamated and the Licensee agree as follows:

1. The Licensor and/or the Amalgamated grants the Licensee a non-exclusive and non-assignable license to affix copies of the labels supplied by the Amalgamated to men's and boys' clothing manufactured by the Licensee only for its own, use or the use of any other manufacturer licensed by the Licensor, the Amalgamated, or any of its affiliates; or, for the Licensee by contractors registered by the Licensee pursuant to the provisions of the said collective bargaining agreement. This License shall not extend to any garments manufactured by the Licensee or by its registered contractors for any other manufacturer not licensed by the Licensor, the Amalgamated or any of its affiliates.
2. The Licensee shall affix copies of the labels to all appropriate garments as follows:
  - (a) a copy of the suit or garment label to every coat forming a part of a suit and to every sport coat, topecoat, and overcoat, and
  - (b) a copy of the trouser label to every pair of single pants (but not to pants forming a part of a suit) manufactured by the Licensee or for the Licensee by registered contractors.
3. The Licensee shall cause all copies of labels supplied by the Amalgamated to be sewed to the garments to which they are affixed by machine (and not by hand) during the process of construction. The Licensee shall not deliver any copies of the label or permit them to be delivered to any retailer or other person except as parts of the garments to which they have been affixed in the factory of the Licensee or the Licensee's contractors.
4. The Amalgamated shall supply the Licensee with copies of labels in such quantities as the production of the Licensee requires.
5. Promptly upon receipt of bills therefor from the Amalgamated, the Licensee shall pay the Amalgamated for copies of suit or garment

labels delivered to the Licensee at \$2.00 per thousand and trouser labels at \$1.00 per thousand.

6. The Licensee shall not copy the labels, cause them to be copied, or obtain copies thereof except from the Amalgamated pursuant to the provisions of this Agreement.

7. This License Agreement shall automatically terminate, without notice from the Amalgamated and the right of the Licensee to use the labels shall immediately cease in the event that:

(a) The existing collective bargaining agreement between the parties terminates by lapse of time or otherwise and is not extended or renewed, with or without modifications; or

(b) The General Officers of the Amalgamated determine that the Licensee has violated any of the terms or conditions of employment provided in the aforesaid collective bargaining agreement or the terms of this License Agreement. However, the right of the Licensee to use the label shall not be terminated until an opportunity is given to the Licensee to appear and be heard before the General Officers of the Amalgamated.

8. In the event of the termination of this License Agreement, the Licensee shall forthwith deliver to the Amalgamated all copies of labels then in the Licensee's possession or control.

9. The exclusive right to institute legal proceedings for any unauthorized use of the labels shall remain in the Amalgamated, but the Amalgamated shall not be liable to the Licensee for any failure to institute such proceedings.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the day and year first above written.

NEW YORK JOINT BOARD of the  
AMALGAMATED CLOTHING WORKERS OF AMERICA,  
Licensor

By .....  
.....  
.....

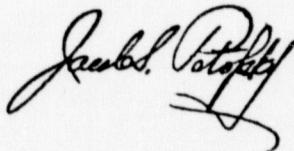
Licensee

By .....

Approved:

AMALGAMATED CLOTHING WORKERS OF AMERICA

By



General President

**SCHEDULE A**

The following are the wage increases for employees of manufacturers of single pants:

1. Effective June 3, 1968, the Employer shall grant a wage increase of seventeen and one-half cents (17.5¢) per hour to all employees employed on a forty hour week and nineteen and four tenths (19.4¢) per hour to employees employed on a thirty-six hour week.
2. Effective September 1, 1969, the employer shall grant a wage increase of fifteen cents (15¢) per hour to all employees employed on a forty hour week and sixteen and six tenths (16.6¢) per hour to employees employed on a thirty-six hour week.
3. The wage increases to be effective in 1970 will be mutually agreed upon between the parties.

MEMORANDUM OF UNDERSTANDING between the NEW YORK CLOTHING MANUFACTURERS' ASSOCIATION, INC. (herein referred to as the Association) and the NEW YORK JOINT BOARD OF THE AMALGAMATED CLOTHING WORKERS OF AMERICA (herein referred to as the Union).

With reference to the agreement entered into between us today, the parties agrees as follows:

1. An alternate holiday with pay may be substituted for Washington's Birthday by agreement between the parties subject to the approval of the National Office of the Amalgamated Clothing Workers of America.

2. It is the intent of the parties with respect to Article XXVII that the introduction of perforated or duplicate patterns on body cloth is a change having substantial repercussions in the clothing industry generally so as to require the prior assent of the General Executive Board of the Amalgamated Clothing Workers of America. Perforated or duplicate patterns on body linings are not included in the foregoing limitation.

3. Anything to the contrary notwithstanding contained in Supplement A of the aforesaid Agreement, the Union shall have the right to present to the Employer the question of vacation pay for the Christmas vacation period on behalf of an employee who does not qualify for same because he was employed after December 1st but prior to Christmas Day during the previous calendar year. If agreement between the Union and the Employer is not reached the Impartial Chairman is expressly empowered to settled said matter.

Dated: New York, June 1, 1968.

NEW YORK CLOTHING MANUFACTURERS' ASSOCIATION, INC.

By

NEW YORK JOINT BOARD OF THE AMALGAMATED CLOTHING  
WORKERS OF AMERICA

By VINCENT LACAPRIA

By LOUIS HOLANDER

C O P Y

80a D-170

PLAINTIFF'S EXHIBIT 4 - LETTER DATED DECEMBER 30, 1971  
OFFICE OF THE IMPARTIAL CHAIRMAN

Men's Clothing Industry

NEW YORK MARKET

100 FIFTH AVENUE, NEW YORK, N. Y. 10011

ROOM 500

TEL 255-6900

HERMAN A. GRAY  
IMPARTIAL CHAIRMAN

December 30, 1970

Mr. Mike Daroff  
Botany Industries Inc.  
1290 Ave. of the Americas  
N.Y. N.Y. 10019

Re: Botany Industries Inc.

Dear Mr. Daroff:

At the request of the New York Joint Board,  
A.C.W.A., I have scheduled a hearing in a matter involving  
the above, for Wednesday, January 6, 1971, at 2:00 P.M. at  
my office, 100 Fifth Avenue, New York City on the 5th floor.

Please be present.

Yours truly,

*Herman A. Gray*  
Impartial Chairman

PLAINTIFF'S EXHIBIT 4

W., G. &amp; M.

January 5, 1971

Mr. Herman A. Cray  
Office of the Impartial Chairman  
Men's Clothing Industry  
100 Fifth Avenue  
New York, New York 10011

Re: Botany Industries, Inc. and  
Levinsohn Bros & Co., Inc.

Dear Mr. Gray:

We are the attorneys for Botany Industries, Inc. Your letter of December 30, 1970 scheduling a hearing at the request of the New York Joint Board A.C.I.A. at your office on Wednesday, January 6 at 2 p.m., has been referred to us.

We have been requested to appear on behalf of our client. However, we wish to make clear that we are unaware of any outstanding issues or grievances subject to arbitration between Botany Industries, Inc. and the New York Joint Board. Until we are apprised of the issues about which this hearing has been called, and have adequate time to ascertain the facts concerning them and make other adequate preparations, we shall not be prepared to proceed to a hearing before you concerning them.

We shall arrange to have in attendance a stenographer and request that a stenographic record of this hearing be made.

Very truly yours,

WEIL, GOTSHAL & MANGES

By

Carl A. Schwarz, Jr.

CAS/ep

In the Matter of the Arbitration

x

Between

x

BOTANY INDUSTRIES, INC.

x

and

x

THE NEW YORK JOINT BOARD OF THE  
AMALGAMATED CLOTHING WORKERS OF AMERICA.

x

x

Hearing held before me on January 6, 1971 and  
January 27, 1971 at my office, 100 Fifth Avenue, New York City.

A P P E A R A N C E S :

For Botany: Weil, Gotshal and Manges  
(Robert Abelow, Esq., Carl A.  
Schwarz, Esq., Donald Moss, Esq.  
of Counsel)

For the Joint Board: Jacob Sheinkman, Esq.  
Clifford Reznicek, Esq.

This proceeding was instituted by the Joint Board.  
The Board seeks a determination and award which will define  
the reciprocal rights and obligations under an agreement entered  
into between itself and Botany Industries, Inc. under date of  
November 1st, 1966. The Board also asks for a direction  
enjoining Botany from violating its obligations under this  
agreement, once the nature of these obligations has been  
determined.

Thus, this proceeding is in effect an application for a declaratory judgment, quite a sound utilization of arbitral procedure. And, if it be bound that Botany is in fact planning to violate its contractual commitments, the issuance of a remedial order on the theory of an anticipatory breach would be proper to prevent great, possible irreparable, damage.

The agreement of November 1st, 1966 recites that a company known as Levinsohn Brothers and Co. has been engaged in the manufacture of boys', students' and Junior clothing pursuant to an exclusive license agreement with Botany, such manufacture being conducted in a "manufacturing facility" owned or operated by Levinsohn and under the terms of a collective agreement with the Joint Board. The agreement further recites that Botany has purchased Levinsohn and that Botany desires "to continue to have such boys', students' and Junior clothing manufactured by <sup>it</sup> <sub>and</sub> on its behalf" under a collective agreement with the Joint Board "and in a manufacturing facility owned or controlled by it", that is, Botany.

Following these recitals Botany makes two promises:

"1. Botany agrees to continue to manufacture boys', students' and Junior clothing in a manufacturing facility operated by Botany or on its behalf, by its own subsidiary, or by a company owned or controlled by it pursuant to the terms of a collective bargaining agreement with the Union."

"2. Botany further agrees that any and all boys', students', and Junior clothing manufactured for and on its behalf shall only be manufactured in production facilities which are in contractual relations with the Union, and that Botany will not cause, directly or indirectly, any of such boys', students' and

Junior clothing to be manufactured in any other production facility which is not in contractual relations with the Union without first obtaining the prior written consent of the Union."

The agreement is made binding on the successors and assigns of the contracting parties and is to continue in effect until June 1, 1981.

At the hearing, Botany argued that the agreement is illegal and therefore lacks force because of the length of its effective term. True, the agreement has a life span which is rather unusual but that in itself does not make it unlawful. The commitments undertaken by Botany are not at all uncommon and there could have been no question about their validity had they been written for a shorter term, say three or five years. There is no discernible rule of law, common or statute, which could be considered to have been violated by having these commitments run for a period of same fifteen years. Agreeing to taking on these obligation was an exercise of business judgment on the part of Botany and no less so was its agreement as to their effective term. With the wisdom of such decisions the Law has no concern.

The first thing that stands out clearly is that Botany has agreed not to engage in the manufacture of boys', students' or Junior clothing, either directly in a plant owned and operated by itself, or in a plant owned or operated by one of its subsidiaries or by any other company which it either owns or controls, or indirectly in any other form, unless such plant operates under collective agreement with the Joint Board, which, among other things, means that it is physically located within

Botany readily acknowledges that this is its obligation. Botany's President, when testifying at the hearing, stated his view that the main, if not the sole, purpose of the November 1st agreement was to keep Botany from manufacturing, or having manufactured on its behalf, the type of clothing involved anywhere except in New York City. This position is restated in Botany's Post-Hearing Memorandum. In view of this acknowledgment and the fact that there is nothing in the record before me which would indicate that Botany is preparing to violate this commitment, there is no reason at this time for the issuance of a cease and desist order. A determination and award declaring the nature of the obligation undertaken by Botany should suffice to guide the parties in their conduct. The parties have by the terms of their agreement conferred a continuing jurisdiction on the arbitrator to run so long as the agreement remains in effect. Should Botany, at any time in the future, act or threaten to act contrary to its obligation as herein declared, the Joint Board will be able to apply to the arbitrator for such remedy as he may find to be warranted by the then situation at that time.

The word "Botany" is a nationally known and established trade name. Such a name when attached to an article offered for sale constitutes a representation of origin, of the character and quality of the workmanship and of the product, thus making for customer appeal and enhancing market value.

There can be little doubt that Botany's obligation not to manufacture, either directly or indirectly, any boys', students' or Junior clothing in any plant other than one which it owns or controls and which is operated under collective agreement with the Joint Board, necessarily carries with it the subsidiary obligation not to use or permit the name "Botany" to be used in connection with any clothing of these types made in any place other than such a plant. The essence of Botany's commitment is that this kind of clothing when bearing its name will have been made by itself or on its behalf by a company under its control in accordance with the working conditions prescribed by the Joint Board's collective agreement. To have garments of the character described made in a plant not owned or controlled by Botany, or one which is not under agreement with the Joint Board, and yet to market them as "Botany" would be both to misrepresent and to deprive the Joint Board of what it gained by the November 1st contract.

Botany's argument in its Post-Hearing Memorandum that to restrain it from selling or licensing the use of its name would be "unconscionable" and "violative" of the anti-trust law is untenable. Surely, no law was violated when Botany agreed to reserve its own name exclusively for its own use in connection with products which it itself manufactured, either directly or indirectly. Neither the aim nor the effect of the agreement was to control market or price. Botany can hardly be heard to speak of an "unconscionable" arrangement which

it itself granted Levinsohn an exclusive license to use its name years before it acquired the stock of that company.

Botany denies that is obligation is as stated above. It claims the right to sell or license the use of the name "Botany" to an outside manufacturer not within its ownership or control. It is in fact treating for such sale or license. Therefore, a declaration of the obligation would not suffice, but must be accompanied with an immediate cease and desist order to prevent damage which in the nature of the situation is likely to be irreparable.

In addition to the negative obligations considered above, Botany also made a positive commitment. It agreed "to continue to manufacture boys', students' and Junior clothing" either in its own plant or in one operated on its behalf by a subsidiary or another company which it might own or control. These words must be taken for what they clearly mean -- an undertaking to continue to make the kind of clothing described. There is nothing anywhere in the agreement from which one could deduce an intent to modify, restrict or condition this simple, direct and absolute language. On the contrary, the recital clause declares that Botany desires "to continue to have such boys', students' and Junior clothing manufactured by <sup>it</sup> <sub>and</sub> on its behalf."

Botany contends that the agreement cannot be read as an affirmative undertaking on its part to continue with the manufacture of the designated clothing, but rather as a restriction

covenant to the effect that so long as it carries on such manufacture it would do so in plants under contract with the Joint Board. The difficulty with this argument is that it drains the first paragraph of the agreement of all effective meaning. The second paragraph is sufficiently clear and sweeping to impose the restrictions on Botany which it says was all that the parties intended to achieve. There would then have been no need for or purpose served by the first paragraph. It is an elementary rule of construction that the language of a contract cannot be thrown out as surplusage unless inescapable.

Nor can Botany successfully argue against the language of its own contract from what may appear in Levinsohn's contract with the Joint Board. As Botany says in its Memorandum, its relationship to Levinsohn is merely that of a stockholder and the latter "has and continues to maintain independent labor and employment policies." The Joint Board is asserting rights under its contract with Botany, not with Levinsohn, and the two contracts are not interdependent. Even if it be true that Levinsohn under its contract may give up manufacturing at any time; it would not follow that Botany could not for itself contract away that right.

Botany's contention that to hold it bound to continue manufacturing boys', students' and Junior clothing for the life of the agreement would be a violation of the Labor Act cannot be entertained by me. The power to administer the Labor Act is vested exclusively in the Labor Board and lies outside my jurisdiction. In so far as law is involved which is within

my purview, Botany's contract, as I construe it, is legal and enforceable.

It may be recognized that a commitment of this kind when coupled with the length of its effective term is unusual and could, because of the changes wrought by a dynamic economy, become burdensome after a time. But, as already said, this does not make it either unlawful or unenforceable. To be sure there are certain principles of law and of equity which, given the proper supporting facts, permit relieving a person from the further performance of a contractual obligation. Botany has not asked for such relief, nor are there any facts in the present record before me which would warrant granting it.

At the time of the hearing before me the factory in the City of New York producing boys', students' and Junior clothing for and on behalf of Botany was in operation and it remained so when this award was being written and issued. Botany is thus in compliance with its obligation as above defined. Therefore, here likewise there is no reason at this time for a remedial order. A declaration of the nature of the affirmative commitment undertaken by Botany will advise the parties of their respective obligations and rights and will enable them to govern themselves accordingly. As noted above, the authority conferred upon the arbitrator by the parties is co-terminous with the life of the agreement. Which means that both the Joint Board and Botany will be able at any time in the future to apply to the arbitrator for such remedy as they may feel they should have and which may be warranted by the facts as they are then.

Therefore, on the basis of the testimony and the 90a  
other evidence submitted and the arguments made on behalf of  
the respective parties, it is hereby determined and awarded  
as follows:

1. Under date of November 1st, 1966 Botany Industries,  
Inc. entered into a written agreement with the New York Joint  
Board of the Amalgamated Clothing Workers of America, which  
agreement was in full force and effect at all of the times  
herein mentioned and is to continue so in force and effect until  
termination date, to wit, June 1st, 1981;

2. By the terms of the aforesaid agreement Botany  
agreed not to engage in the manufacture of boys', students',  
or Junior clothing, either directly in a manufacturing facility  
owned and operated by itself, or in a manufacturing facility  
owned or operated by one of its subsidiaries or by any other  
company which it either owns or controls, or indirectly in any  
other form, unless such manufacturing facility operates under  
collective agreement with the Joint Board, that is, among  
other things, it is physically located within the geographic  
jurisdiction of the Joint Board;

3. By the terms of the aforesaid agreement Botany  
further agreed that the word "Botany" would be used in connection  
with the manufacture, sale or other disposition of boys',  
students', or Junior clothing only if such clothing were  
manufactured in a manufacturing facility owned and operated  
by itself, or by one of its subsidiaries, or by another company  
which it either owns or controls, and which said manufacturing  
facility was being operated under the terms of a collective  
agreement with the Joint Board;

4. Botany should be and it hereby is directed

91a

not to sell or license and not to agree to sell or license the  
word "Botany" or any symbol or mark/contains this word for use  
in connection with the manufacture, sale or other disposition  
of any boys', students', or Junior clothing which is not being  
manufactured or has not been manufactured in a manufacturing  
facility owned and operated by Botany or by one of its  
subsidiaries, or by another company which it owns or controls,  
and which manufacturing facility was or is operated under the  
terms of a collective agreement with the Joint Board; and Botany  
is further directed not to permit or to agree to permit the  
use of the word "Botany" in any other way whatsoever in  
connection with clothing of the kinds hereinabove named unless  
such clothing has been or is being manufactured in a manufaturi:  
facility as hereinabove described;

5. By the terms of the aforesaid agreement Botany  
further agreed during the effective term of the agreement, to  
wit, until June 1st, 1981, to continue to manufacture boys',  
students', and Junior clothing in a manufacturing facility owned  
or controlled by it, or on its behalf by its own subsidiary or  
by a company owned or controlled by it, which facility is  
operated under collective agreement with the Joint Board.

DATED: New York  
February 23, 1971

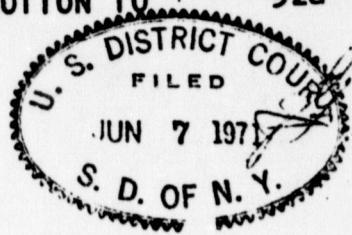
  
HERMAN A. GRAY, Arbitrator

State of New York )  
County of New York )  
SS:

On this 23rd day of February, 1971, before me personally  
came HERMAN A. GRAY, to be known and known to me to be the  
individual described in and who executed the foregoing instrument  
and he duly acknowledged to me that he executed the same.

DEFENDANT'S AFFIDAVIT IN OPPOSITION TO MOTION TO  
VACATE ARBITRATION AWARD  
(Filed June 7, 1971)

92a



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
BOTANY INDUSTRIES, INC.,

Plaintiff,

*Judge Edelstein*  
71 Civ. 2381

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

AFFIDAVIT IN OPPOSITION TO  
MOTION TO VACATE ARBITRA-  
TION AWARD

Defendant.

-----x  
LOUIS HOLLANDER, being duly sworn, deposes and  
says:

1. I am Co-Manager of the defendant New York Joint Board, Amalgamated Clothing Workers of America (hereinafter called the "Joint Board"), an affiliate of the Amalgamated Clothing Workers of America (hereinafter called the "Amalgamated"), and have been so for 38 years. For convenience I shall refer to the Amalgamated and the Joint Board together as the "Union". I have read the affidavit of Carl B. Schwarz, Jr., sworn to May 21, 1971, in support of the application for an order vacating and setting aside the arbitration award of Herman A. Gray, dated February 23, 1971, inter alia. I am making this affidavit in opposition to that application, and in support of the cross-motion to confirm.

2. Before addressing myself to the merits, however, and for the information of the Court, I would

like to describe briefly the development of collective bargaining relationships in the industry insofar as pertinent here.

3. The Amalgamated is a national labor organization of some 385,000 members of whom approximately 125,000 are employed in the men's and boys' clothing industry. For many years it has enjoyed a national reputation for outstanding achievement in the field of constructive, harmonious and peaceful labor-management relations. The Joint Board is the New York City affiliate of the Amalgamated in the men's and boys' clothing industry. It has approximately 40,000 members in Greater New York metropolitan area. All manufacturers of men's and boys' clothing in that area are in contractual relations with it.

4. During the first two decades of the century the men's clothing industry, both nationally and in New York City, was one of the most unstable and chaotic in the nation from the point of view of the manufacturer, and one of the most exploited from the point of view of the workers. With the workers largely unorganized into trade unions, hours were frequently as long as 70 and wages were near the bottom of the industrial scale, homework was prevalent and factory conditions were unsanitary and unhealthy. The miserable working conditions in the industry led to periodic efforts at trade union organization, which in turn resulted in a series of costly and bitterly contested strikes.

5. In New York City, the predecessor of the Joint Board made its first major effort to organize the industry in the strike of 1913. However, the major part of the New York City industry was not organized until after a bitter six months lockout in 1921. Thereafter the major part of the industry entered into collective bargaining agreements with the Union. From the first,

these agreements provided for the peaceful settlement of all disputes and grievances by a permanent impartial chairman who acted as arbitrator in the industry. With the organization of the New York Clothing Manufacturers' Exchange in 1924, which permitted group dealings between the Union and the employers, wages, hours and working conditions became standardized throughout the New York City market and labor management relations were placed upon a wholesome, healthy and stable basis. As a result there has been no major strike in the New York City industry since 1921. The conditions of the workers have steadily improved with shorter hours, higher wages and such additional benefits as paid vacations and holidays and employer-financed life, accident, health and retirement insurance.

6. From the outset of its organizing efforts, one of the major problems confronting the Union was that of the runaway shop. Entrance into the clothing industry does not require a large capital investment. The machinery required is physically light, and highly mobile. Shops can be literally moved overnight. The industry is highly fragmented, where many different manufacturers or contractors may work on a single garment. Owners of the goods can place them in one of many shops, depending on the lowest cost. While certain key operations require a high degree of skill, others can be learned fairly easily. Therefore, there has always existed an incentive on the part of some employers and contractors to leave the organized urban centers, where working conditions are good and wages relatively high, and to establish themselves in small towns or semi-rural areas in search of a plentiful supply of cheap non-union labor. The migration of the industry has from time to time been a real threat not only to the jobs, wages and

working conditions of the New York City clothing workers, but to the continued prosperity of the City itself, since the manufacture of men's clothing constitutes a very significant percentage of its industry. In this regard, New York City is particularly vulnerable due to its higher wage structure and cost of living. Thus, manufacturers need not necessarily seek a rural area, but can often obtain substantial benefits by even moving to another metropolitan center. But the net result is the same -a loss of jobs for New York City residents.

7. In order to safeguard and assure the jobs of its members and prevent the undermining of their wages and working conditions, the Union, early in its organizing efforts, requested and secured provisions in its collective bargaining agreements to the effect that the manufacturer would not move its factory outside of the metropolitan area. The Union learned from experience, however, that manufacturers successfully evaded and defeated these provisions either by not actually moving or by variations of the moving strategy. Some of them closed their manufacturing businesses in New York, but did not themselves directly enter into a clothing business employing non-union workers elsewhere. Instead they bought into a non-union establishment either as a partner, stockholder or otherwise, and then contended that their action did not constitute a violation of their contractual obligation. In other cases a principal partner or stockholder in a unionized manufacturing business would make such a purchase. Still others would engage in variations of all of these strategies of moving and purchasing.

8. In addition, employers have operated the identical clothing business under a variety of legal forms. Thus, it is not uncommon in this industry to find one business being operated by an

individual together with one or more corporations, or over a period of years for one business to operate under a myriad of legal forms. Due to this fluidity of business forms, involving the same individual and/or individuals, the Union has learned that the provisions against the runaway shop or in fact, the very agreement itself, could be easily evaded.

9. For all these reasons, the collective bargaining agreements between the Union and the New York Clothing Manufacturer Exchange, Inc., a trade association of manufacturers of men's, boys and children's clothing in the City of New York, have contained the following provisions for years (see plaintiff's exhibit 3, attached to the moving papers):

- i. a prohibition against an employer moving his factory without union consent (Article XV);
- ii. a provision for the discharge of employees for just cause only (Article XVIII);
- iii. a prohibition against lockouts (Article XX);
- iv. a prohibition against officers of a signatory corporation acquiring an interest in none-union clothing factories (Article XXIIIB); and,
- v. a broad provision for arbitration of all disputes before the Impartial Chairman of the industry (Article XIX).

10. Levinsohn Bros. & Co., Inc., a manufacturer of boys' students' and junior clothing, has been in business in New York City for many years. It also has been in contractual relation with the Union for a long period of time. As indicated in the moving affidavit (paragraph 9), it was party to a collective bargaining agreement at the time it originally entered into the license agreement with Botany Industries, Inc., (hereafter referred

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to as "Botany") and was also party to a collective bargaining agreement dated June 1, 1968 with the Union (paragraph 12). It was a high-grade manufacturer of said boys' clothing and it established its own reputation and trade mark even before it entered into the license agreement with Botany. As long as Levinsohn operated its own business and even after the licensing agreement with Botany became effective, the provisions of the collective bargaining agreement noted above were sufficient to protect the employment and job security of its employees. This flows, of course, from the fact that Levinsohn as an independent manufacturer would seek to protect its own name and good will in the industry.

11. In 1966, however, Botany acquired all the shares of Levinsohn (paragraph 10 of the moving affidavit). Botany, of course, is a conglomerate that has been involved in many different types of business through various corporate structures from time to time. (Attached hereto and made a part hereof and marked Exhibit 1, is a summary of Botany which has been taken primarily from its annual reports.) The Union recognized that the takeover of Levinsohn by Botany could present problems. As a matter of fact, it foresaw exactly what happened in this case, that is, that Botany as the sole owner of Levinsohn and the owner of the "Botany" label would dictate all the terms and conditions concerning the operation of the Levinsohn business since Levinsohn existed in name only, and Botany was the master of its fate. Since Botany was not signatory to any contract with the Union, the Union realized that it needed further protection for the same reasons and purposes as the provisions in its contract with Levinsohn. Thus, in the fall of 1966, when Michael Daroff, Chairman of the Board and

President of Botany, came to my office to advise me of Botany's purchase of Levinsohn, I explained the Union's position to him. I told him of my concern and that we wanted assurances from Botany that the 400 people then working at Levinsohn would not lose their jobs. He agreed to this. These conferences ultimately resulted in the November 1, 1966 agreement between Botany and the Union. (Exhibit #2 attached to the moving papers.) The Arbitrator has now found, in essence, that Botany agreed to continue to manufacture until June 1, 1981, "boys', students' and junior clothing in a manufacturing facility owned or controlled by it or on its behalf by its own subsidiary or by a company owned or controlled by it, which facility is operated under collective agreement with the Joint Board". He further found that Botany is not to sell or license the word "Botany" in connection with the manufacture of any boys', students' or junior clothing unless the "manufacturing facility was or is operated under the terms of a collective agreement with the Joint Board." (Paragraphs 4 and 5 of the award, exhibit 6 attached to moving papers.)

12. The plaintiff, in seeking to avoid the impact of the Arbitrator's rule, attempts to establish the complete separation and distinct nature of the relationship between Botany and Levinsohn. The plaintiff's own papers belie such a contention. In his affidavit, Mr. Schwarz admits that Botany now owns all of the shares of Levinsohn (paragraph 10) and further, that it has some "common directors". Mitchell N. Daroff is the President of Levinsohn and he is also Vice-President of Botany Industries Inc., the parent corporation. In addition, he is the Executive Vice-President of Worsted-Tex, Inc., an affiliate or subsidiary of

Botany, and Vice-President of Botany Products Corporation, another affiliate or subsidiary. James N. Greene is Vice President-Secretary of Levinsohn and he is a Vice-President, Executive Assistant to the President, and Secretary of Botany Industries, Inc. He also is Vice-President and Secretary of Fashion Park, Inc. Stein Bloch, Christian Dior, a Botany subsidiary or affiliate, Vice-President and Secretary of Glenoit Mills, Inc., another subsidiary or affiliate of Botany, and Vice-President and Secretary of Botany Products Corporation. (See Exhibit I attached.)

13. Mr. Schwarz in his affidavit also admitted that Levinsohn operated under a license agreement from Botany from August 27, 1963 until July 1, 1966, and a copy of said agreement was annexed to his affidavit as Exhibit No. 1. I call this Court's attention to the fact that in paragraph 1 of said agreement Levinsohn received an exclusive right and license to manufacture only certain sizes of boys' clothing. It further strictly limits Levinsohn's right to sell boys' trousers only in conjunction with suits or sport coats. I further call the Court's attention to the strict control Botany retained over the quality, workmanship and style of the products manufactured by Levinsohn, set forth in paragraph 3 of said exhibit. Samples of all of Levinsohn's work were required to be submitted to Botany and if Botany disapproved any such garments Levinsohn could not sell the same under the "Botany" trade mark. Under paragraph 4(c), (d), (e) and (f) severe restrictions were placed upon the right of Levinsohn to sell any Botany garments manufactured by it. Under paragraph 5 of said agreement, Botany retained control over the labeling, packaging and advertisement of all garments manufactured

by Levinsohn. In his affidavit (paragraph 13) Mr. Schwarz states that "Levinsohn has always continued, since its acquisition by Botany, to manufacture boys', students' and junior clothing under the terms of its licensing agreement with Botany." Thus, since on or about July 1, 1966 until the Spring of 1971, when all operations in New York City ceased, Levinsohn has operated under the same restrictions as those contained in the licensing agreement plus the fact that Botany owned 100% of its stock.

14. Since 1966 and from time to time, I have had other occasions to talk with Michael Daroff, the Chairman of the Board and President of Botany, to discuss problems involving the Levinsohn plant. Members of my staff have been to Botany's office located at 1290 Avenue of the Americas, New York City, and I am advised that Levinsohn maintains its own office in the same suite.

15. The arbitration was called at my request as I had heard that Botany was planning on closing down the Levinsohn operation, and this has now been accomplished. I attended both arbitration hearings that were held on January 6 and 27, 1971. I recall that at the hearing held on January 6 Botany's attorney, Mr. Schwarz, requested more time to answer the Union's charges inasmuch as prior to then he was not aware of the nature of the dispute. The Arbitrator granted this request and a full hearing was held on January 27, which was attended by Mr. Michael Daroff.

16. Some 400 workers formerly employed by Levinsohn lost their jobs as a result of the shutdown of the Levinsohn's manufacturing operations in New York City.

Sworn to before me this

4th day of June, 1971

*Jacob Scheinkman*  
JACOB SCHEINKMAN  
Notary Public State of New York  
No. 31-6958040  
Qualified in Westchester County

*Louis Hollander*  
Louis Hollander

"The combination of Botany's name and Daroff's workmanship built the Botany-Daroff operation into ... the country's largest men's wear manufacturer in the brand name field." "The plans for the future reflect the philosophy of management of what Botany should be. No longer is it a corporation with unrelated subsidiaries. Instead it is a company concentrating in the brand name consumer field where its products enjoy high retail consumer acceptance." "Botany today is an active, well integrated corporation." Annual Report, 1965.

#### Corporate Structure and History

Botany originally was a manufacturer of woolens and worsteds for the apparel trades. Through a series of acquisitions of established retail and manufacturing companies in the male apparel fields, it has expanded and diversified.

The organization<sup>1/</sup> now embraces a group of men's clothing manufacturers; a manufacturer of luggage; a manufacturer of pile fabrics; and about 100 retail male apparel stores, comprising about six separate chains, bearing well known names in the areas in which they operate.<sup>2/</sup> The company also licenses other manufacturers to use the "Botany" label.

Botany and its subsidiaries share common offices at 1290 Avenue of the Americas, New York City, and have many common<sup>3/</sup> directors and officers.

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1/ The subsidiary corporations are listed in Appendix I.

2/ The Retail Stores Division is listed in Appendix II.

3/ The relationship of the officers and directors of Botonay and its subsidiaries is shown in Appendix III.

As part of management's program, weekly conferences are held to formulate and effect policy. In addition to these, presidential meetings are held several times each year ... with the various presidents of Botany subsidiaries and divisions to pinpoint problems that may arise, and to formulate overall corporate policy. Comptrollers' meetings are also held periodically ... to discuss fiscal matters. Similarly, advertising and promotion executives have met to develop a total sales program.

Annual Report, 1967, p. 6.

#### Marketing and Operations

As noted above, the object of the company has been to expand its operations, and "concentrating on the brand name in the consumer field, where its products enjoy high retail consumer acceptance." These brand names are "Botany," "Botany 500," "Tailored by Daroff," ostensibly manufactured by H. Daroff & Sons, "Worsted Tex," "Tropi-Tex," and "Gord-McLeod," ostensibly manufactured by the House of Worsted-Tex, Inc. Botany is the largest brand name advertiser in the industry, "having one of the finest product lines" on the market today. (Annual Report, 1968, p. 27).

The various divisions have worked closely with the manufacturers in the development of new products. For example, the Licensing Division participated in the development of the Weathertopper raincoat. Annual Report, 1966, p. 19.

#### The Botany Products and Licensing Division

An integrated part of the Botany Industries operation is the Licensing Division, having 23 licensees, Annual Report, 1970, using the "Botany" label on a royalty basis. Each licensee has an exclusive license in his field. Annual Report, 1968. Prior to its acquisition Levinsohn was a licensee.

Through the Licensing Division, the parent firm markets and advertises some of the products manufactured by the licensees while others are marketed by the licensees themselves. These products, which cover the whole range of men's wear (e.g., ties, shirts, sweaters, pajamas, etc.) all carry the Botany label that conforms to the "established high quality standards set by Botany," Annual Report, 1970, p. 3 so that the customer is assured of receiving all the benefits of a widely respected and nationally advertised brand name. Annual Report, 1967, p. 26.

Levinsohn Brothers had been an (exclusive) licensee under the Botany label for boys' clothing since 1955. Annual Report, 1966, p. 10. "Botany plans substantial increases in the volume of Levinsohn Bros.' operations. With a program of gradual expansion of its N.Y. facilities ..." (Ibid).

The clothing manufacturers operations and product lines have been broadened with the acquisition; it is the largest producer of boys', cadets' and young men's clothing in this country. "Thus we will now keep our finger on the fashion pulse of this important young market and develop for tomorrow a continuity of customers' awareness of the "Botany" 500 and Worsted-Tex brands". Annual Report, 1966, p. 3.

This acquisition had its effect on other subdivisions of Botany; the House of Worsted-Tex, could look forward to the expanding youth market and is now introducing the Levinsohn line under the Worsted-Teen label, featuring boys' cadets' and young men's suits. Annual Report, 1970, p. 10. Suits and sports coats manufactured by Levinsohn was to open up a new market for Botany label products in the increasingly fashion-conscious young men's market.

The acquisition was a "forward step in making Botany Industries a complete and all inclusive men's wear firm".

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Annual Report, 1966, p. 10. The purpose was to take advantage of the growing trend in the 18-25 year range in fashion consciousness and Botany's preparation to satisfy this demand. Annual Report, 1969, p. 4.

BOTANY INDUSTRIES, INC. (Delaware) - Employer #22-0784040

<u>Subsidiary</u>	<u>Incorporated</u>
BMG Investment Corporation	Texas
Botany Mill Store, Inc.	New Jersey
Botany Products Corp.	New York
Botany Stores, Inc.	Nevada
Botany Weathertopper	New York
Hydronair Corp.	New York
Broadstreets, Inc.	New York
Broadstreets Inc.	Illinois
Broadstreets, St. Louis	Missouri
The B R Baker Co.	Ohio
H. Daroff & Sons, Inc.	Pennsylvania
Fashion Park, Inc.	New York
Garfield Worsted Mills, Inc.	Pennsylvania
Glenoit Mills, Inc.	Delaware
Glenoit-Dobbie, Inc.*	New York
Glenoit (U.K.) Ltd.**	England
Harris & Frank, Inc.	Nevada
House of Worsted-Tex	Maryland
Josam Tailors, Inc.	New York
Levinsohn Bros. & Co., Inc.	New York
A. May & Sons, Inc.	Michigan
Prager's Inc.	Washington
Maurice L. Rothchild & Co.	Illinois
Klec Bros. & Co.	Illinois
Weber & Heilbronner, Inc.	New York

\* 55% of shares

\*\* 72.5% of shares

BOTANY INDUSTRIES, INC./RETAIL STORES DIVISION

WEBER & HEILBRONER, INC.  
New York and New Jersey

(13 Stores)

BROADSTREET'S, INC.  
New York and New Jersey

(13 Stores)

BROADSTREET'S, INC.  
Chicago

(4 stores)

BROADSTREET'S  
St. Louis

(4 Stores)

HARRIS & FRANK, INC.  
Southern Division

(29 Stores)

HARRIS & FRANK, INC.  
Northern Division

(12 Stores)

HARRIS & FRANK, INC.  
Northwestern Division

(4 Stores)

MAURICE L. ROTHSCHILD AND CO.  
Chicago

(10 Stores)

WILLIAM H. WANAMAKER  
Philadelphia and New Jersey

(7 Stores)

B. R. BAKER COMPANY  
Toledo

(5 Stores)

MAY'S OF MICHIGAN -  
Grand Rapids

(3 Stores)

## WORSTED-TEX, INC.

Michael Daroff - Chairman of the Board  
Joseph A. Daroff - President  
Mitchell N. Daroff - Executive Vice President  
Phillip Zuckerman - V.P. & Director of Sales

FASHION PARK, INC., STEIN BLO  
CHRISTIAN DIOR

Michael Daroff - Chairman of the Board  
Donald Norton - Executive Vice President  
Joseph A. Daroff - Vice President  
James N. Greene - Vice President & Secretary  
Norman A. King - Vice President, Manufacturing  
Frank Gualtieri - Vice President, Design  
Carlton H. Rosin - Treasurer  
George Schenk - Assistant Treasurer  
Alden Moldt - Controller

## GLENNOIT MILLS, INC.

Clarence E. Hafford - President  
A. Z. Halpern - Executive Vice President  
James N. Greene - Vice President & Secretary  
J. W. Cooper - Treasurer

## THE BALTIMORE LUGGAGE COMPANY

Gertrude Holtzman - President  
Samuel Holtzman - Vice President & General Manager  
Joseph Rivkin - Vice President & Sales Manager

## BOTANY INDUSTRIES.

Michael Daroff\* - Chairman of the Board  
James N. Greene - V.P., Executive Vice President  
Joseph A. Daroff\* - Vice President  
Mitchell N. Daroff\* - Vice President  
Samuel J. Holtzman\* - Vice President  
Clarence E. Hafford\* - Vice President  
Henry C. Schwartz\* - Vice President  
Carlton H. Rosin - Treasurer  
Donald Fischer - Controller  
Stanley Topol - Assistant Controller  
Gertrude Holtzman - Assistant President

\* Director

H. DAROFF & SONS, INC.

Michael Daroff - Chairman of the Board  
Joseph A. Daroff - President  
Mitchell N. Daroff - Executive V.P. & Treasurer  
Nicholas Mancini - V.P., Production & Quality  
Arthur Silvers - V.P., Dir. of Sales & Marketing  
Michael Kent - V.P., Piece Goods Merchandising  
Stanley Voice - V.P., Advertising  
Sidney Daroff - V.P., Public Relations  
Harold Lashner - Sec'y & Assistant Treasurer

INC.

the Board & President

Assist. to Pres. & Sec'y

ident

resident

resident

President

esident

Chief Financial Officer

& Assistant Treasurer

ntroller

it Secretary

LEVINSOHN BROS. & CO., INC.

Mitchell N. Daroff - President  
Harold Horowitz - Executive Vice President  
Leonard Zeitlin - Vice President, Sales  
Leo Greenberg - Vice President & Controller  
James N. Greene - Vice President - Secretary  
Jack Kronenberg - Vice President, Manufacturing

LICENSING DIVISION AND  
BOTANY PRODUCTS CORPORATION

Leslie Fleming - President  
Mitchell N. Daroff - Vice President  
James N. Greene - Vice President & Secretary  
Carlton H. Rosin - Treasurer

BOTANY RETAIL STORES DIVISION

Henry C. Schwartz - President  
Sidney Lieber - Vice President & Controller  
Larry Levy - V.P. & Merchandise Manager, Clothing  
Harold Fineman - V.P. & Merchandise Manager,  
Sportswear & Furnishings  
Richard Rogers - Manager, Ladies Division

DEFENDANT'S NOTICE OF MOTION TO CONFIRM ARBITRATOR'S AWARD 108a  
UNITED STATES DISTRICT COURT (Filed June 28, 1971)  
SOUTHERN DISTRICT OF NEW YORK

-----X  
BOTANY INDUSTRIES, INC.

Plaintiff : 71 Civ. 2381

-against- : NOTICE OF MOTION  
NEW YORK JOINT BOARD, AMALGAMATED : TO CONFIRM  
CLOTHING WORKERS OF AMERICA : ARBITRATION AWARD

Defendant :

SIR:

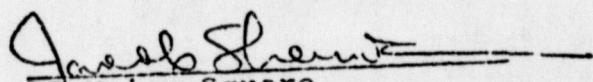
PLEASE TAKE NOTICE that upon the affidavit of Louis Hollander, verified June 4th, 1971 previously received by your office and the Court under the caption "affidavit in opposition to motion to vacate arbitration award" a motion will be made to this Court before Judge David N. Edelstein at the Federal Court house, Foley Square, in the city, county, and state of New York, on July 13, 1971, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Title 9 USC and Rule 7 of the Federal Rules of Civil Procedure directing judgment pursuant to Title 9 USC entitled Arbitration and Section 301 of the Labor Management Relations Act of 1947 as amended, 29 USC 185, confirming the arbitration award of Herman A. Gray, Impartial Chairman, verified February 23, 1971 and for the costs of this proceeding and for such further relief as the Court may seem just and proper.

Jacob Sheinkman

Attorney for Defendant

Dated New York, New York

June 24, 1971

  
15 Union Square  
New York, New York 10003  
(212) 255 7800

TO: Weil, Gotshal & Manges  
767 Fifth Avenue  
New York, New York 10022

PLAINTIFF'S AFFIDAVIT IN REPLY AND ANSWER TO CROSS-MOTION  
(Filed July 1, 1971)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-x -  
BOTANY INDUSTRIES, INC.,

Plaintiff,

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

Defendant.

-x -  
STATE OF NEW YORK )  
                      ) ss.:  
COUNTY OF NEW YORK )

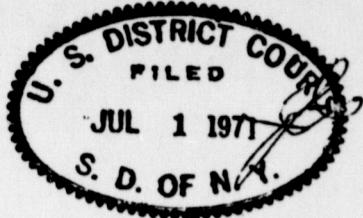
EILEEN PURCELL being duly sworn, deposes and says,  
that deponent is not a party to the action, is over 18 years  
of age and resides at 146-16 28th Avenue, Flushing, New  
York 11354. That on the 30th day of June, 1971, deponent  
served the within Reply Memorandum and Affidavit of Harold  
Horowitz upon Jacob Sheinkman, Attorney for the New York  
Joint Board in this action, at 15 Union Square, New York,  
New York 10003 the address designated by said attorney for  
that purpose by depositing same enclosed in a postpaid  
properly addressed wrapper, in an official depository under  
the exclusive care and custody of the United States post  
office department within the State of New York.

Eileen Purcell  
Eileen Purcell

Sworn to before me this

30th day of June, 1971.

109a



71 Civ. 2182 D.N.Y.  
2381

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

110a

BOTANY INDUSTRIES, INC.,

No. 71 Civ. 2381

Plaintiff,

-against-

AFFIDAVIT IN  
REPLY AND ANSWER  
TO CROSS MOTION

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

Defendant.

HAROLD HOROWITZ, being duly sworn says:

1. I am the Executive Vice-President of Levinsohn Bros. & Co., Inc. ("Levinsohn") and have been so since May, 1970. I have read the Affidavit of Louis Hollander sworn to June 4, 1971, in support of the Cross Motion to confirm the Award of Herman Gray dated February 23, 1971 (Exhibit 6)\*.

2. I have been in the clothing and apparel industry since 1937. As the Executive Vice-President of Levinsohn I am the officer principally responsible for the operation of that company. The other officers of Levinsohn who share in this authority are Leo Greenberg, Vice-President and Controller, Jack Kronenberg, Vice-President in charge of Production, and Leonard Zeitlan, who until January, 1971, was Vice-President in charge of Sales. Mr. Mitchell Daroff and Mr. James Greene (now deceased), while officers of Levinsohn, do not actually

\*References to Exhibits are to those attached to the Affidavit of Carl A. Schwarz, Jr. in support of a motion to vacate Arbitration Award.

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participate in the operation and management of Levinsohn.

3. The Affidavit of Louis Hollander described at great length the history of unionization in the clothing industry (paragraphs 2 - 5). He recites the need for protection against plants leaving the Greater New York Area (paragraphs 6 - 8). In paragraph 9 he lists the clauses in the Collective Bargaining Agreement between the New York Clothing Manufacturers Association, Inc. and the New York Joint Board, Amalgamated Clothing Workers of America (Exhibit 3) which govern the operation of Levinsohn. In particular, Mr. Hollander refers to Article XV of that Agreement which prohibits an employer from moving a factory without the approval of the New York Joint Board, Amalgamated Clothing Workers of America (the "Joint Board"). Mr. Hollander stresses this clause which I believe is of no relevance in this proceeding. Levinsohn is not moving and does not intend to move its plant. However, Mr. Hollander does highlight the fact that the Collective Bargaining Agreement covering the employees working for Levinsohn has always been with Levinsohn prior to entering into any licensing arrangement with Botany Industries, Inc. ("Botany"); prior to Botany purchasing any of the stock of Levinsohn, or prior to any Botany officer becoming a member of its

management. The employer-employee relationship between 112a

Levinsohn and its employees has never been changed by its licensing arrangements or ownership by Botany.

Levinsohn has independently established personnel policies and practices which are for the most part completely governed by its Collective Bargaining Agreement. This Collective Bargaining Agreement is negotiated with the Joint Board through and by the New York Clothing Manufacturers Association of which Levinsohn has always been a member. This Collective Bargaining Agreement sets wages and all other standards of employment.

Botany does not exercise any more control over Levinsohn than it does over any other licensee of its trademark.

Botany has innumerable licensees which are not in any way owned or controlled by it.

4. In paragraph 10 of this Affidavit, Mr. Hollander admits that Levinsohn has been and is a manufacturer of boys', students', and junior clothing. While, as Mr. Hollander admits, Levinsohn was and is an independent manufacturer, his statement that Levinsohn had established its own reputation and trademarks before it entered into

the License Agreement (Exhibit 1) with Botany is inaccurate. Levinsohn had no trademarks known to the consuming public although it did manufacture under a trademark known as "Jayson" known to some extent in the industry.

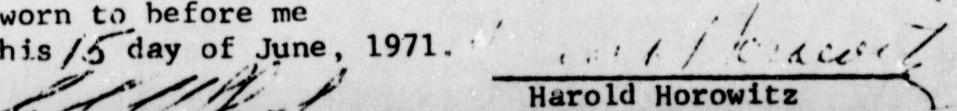
5. In paragraphs 12 and 13 of his Affidavit, Mr. Hollander seeks to establish that Botany and Levinsohn are part of an integrated process in the clothing industry. This is in error. Levinsohn buys all of its own cloth through mills and converters which are in no way related to Botany. These raw materials are converted into finished garments by Levinsohn or by contractors of Levinsohn which are in no way related to Botany. Levinsohn has its own Sales Department and its own Shipping Department. Thus, no manufacturing, contracting, sub-contracting, or jobbing is done by Botany. Levinsohn is a separate and independently operated entity and not part of any integrated process of manufacture with Botany. An integrated process would be one in which a chain of buying raw materials, manufacturing finished goods, selling and distributing those goods exists in which more than one company participates. Such a chain would constitute a vertically integrated process. An integrated process may also exist horizontally. An example of this would be a situation in which common warehousing and an interchange

of work at the same level would occur. Neither of 114a  
these situations exists in the relationship of Botany  
and Levinsohn although Levinsohn and its contractors,  
which are not owned or controlled by Botany, do constitute  
an integrated process.

6. Botany and Levinsohn stand in the  
relationship of licensor and licensee as well as parent  
and subsidiary. Mr. Hollander admits in paragraph 11  
that Botany was not a signatory to any Collective  
Bargaining Agreement with the Joint Board. Levinsohn's  
financial relationship to Botany is to account for  
profits and losses and payments of royalties on goods  
bearing the Botany label. Levinsohn has always had the  
right to manufacture and sell clothing bearing labels  
other than those owned by Botany and has done so.

7. I am familiar with the licensing  
arrangements between Botany and companies other than  
Levinsohn. These arrangements give Botany the same or  
similar rights of control that it exercises over goods  
bearing its labels produced by Levinsohn. This is true  
in instances where Botany exclusively licenses companies  
it does not otherwise own or control. Therefore, Botany's  
licensing arrangement with Levinsohn gives Botany no  
more or less control than it has over its many other  
licensees which it does not own or control.

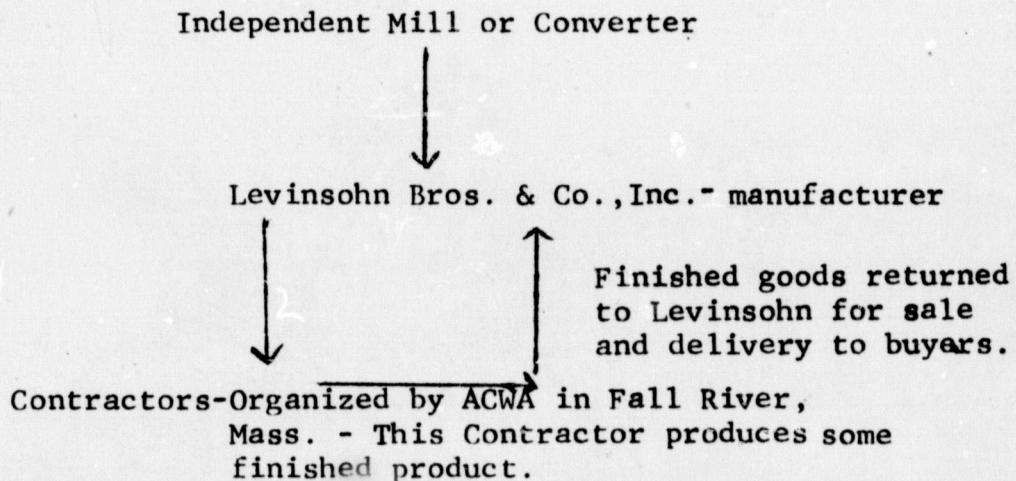
Sworn to before me  
this 15 day of June, 1971.

  
Harold Horowitz

SCHEDULE A

115a

The following is a diagram of the process  
by which Levinsohn manufactures clothing.



An integrated process would be one in which a chain of buying raw materials, manufacturing finished goods, selling and distributing these goods exists in which more than one company participates. Such a chain would constitute a vertically integrated process. An integrated process may also exist horizontally. An example of this would be a situation in which common warehousing and an interchange of work at the same level would occur.

Botany and Levinsohn are not part of an integrated process in the clothing and apparel industry. Their relationship is one of licensor and licensee and parent corporation and subsidiary corporation. As can be seen from the diagram, Botany does not participate

OPINION OF CHIEF JUDGE EDELSTEIN (Filed April 12, 1974) 116a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

X

BOTANY INDUSTRIES, INC.,

Plaintiff,

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

Defendant.

X

EDELSTEIN, Chief Judge:

OPINION

This is an action in which plaintiff employer seeks to vacate a labor arbitration award and defendant union seeks to confirm and to enforce the award.

The relevant facts, which are not in dispute, are as follows. In 1963, plaintiff Botany Industries, Inc. (hereinafter referred to as "Botany") licensed Levinsohn Bros. & Co., Inc. (hereinafter referred to as "Levinsohn") to manufacture and sell boys', students' and junior clothing; and to use the trademark "Botany" on the manufactured clothing. At the time the licensing agreement was entered into, Levinsohn had a collective bargaining agreement with defendant New York Joint Board, Amalgamated Clothing Workers of America (hereinafter referred to as "Joint Board"). In 1966, Botany acquired all of the shares

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of Levinsohn and began operating it as a wholly-owned subsidiary, albeit as a separate corporation. The acquired corporation continued to be known as Levinsohn Bros. & Co., Inc. On November 1, 1966, in conjunction with the acquisition of Levinsohn stock, Botany entered into an agreement with the Joint Board which provided, inter alia:

1. Botany agrees to continue to manufacture boys', students' and junior clothing in a manufacturing facility operated by Botany or on its behalf, by its own subsidiary, or by a company owned or controlled by it pursuant to the terms of a collective bargaining agreement with the union.

2. Botany further agrees that any and all boys', students' and junior clothing manufactured for and on its behalf shall only be manufactured in production facilities which are in contractual relations with the union, and that Botany will not cause, directly or indirectly, any of such boys', students' and junior clothing to be manufactured in any other production facility which is not in contractual relations with the union without first obtaining the prior written consent of the Union.

Paragraph 3 of the Agreement further provides, in pertinent part, that "Any controversy or claim arising out of or relating, directly or indirectly, to the provisions of this Agreement, or the interpretation and performance thereof, shall be settled by arbitration." This Agreement was to remain in effect until June 1, 1981.

In December 1971, based upon a report that Botany intended to close down the Levinsohn operation, the Joint Board requested a hearing before an arbitrator for the purpose

of determining the rights and obligations of the parties under the 1966 Agreement which, the arbitrator noted, was "in effect an application for a declaratory judgment." Although Botany questioned the reasons for the hearing, <sup>1/</sup> it agreed to attend.

After devoting two days to a hearing of the matter, Arbitrator Herman Gray rendered an award in favor of the Joint Board. The essence of the award, the text of which is reprinted in the margin, <sup>2/</sup> is that (1) Botany agreed that it would continue to manufacture boys', students', and junior clothing in a manufacturing facility owned or controlled by Botany, by a subsidiary of Botany, or by a company owned or controlled by Botany until June 1, 1981; (2) Botany agreed that the above described clothing would only be manufactured in a manufacturing facility operated under a collective agreement with, and under the geographic jurisdiction of, the Joint Board; and (3) Botany agreed that the trademark "Botany" would be used on the above described clothing only if the clothing was manufactured in a facility operated under a collective agreement with the Joint Board. The arbitrator also forbade Botany from licensing or selling the trademark "Botany" for use in connection with the manufacture, sale or other disposition of the above described clothing unless the sale is to, or the license is with, a facility under a collective agreement with the Joint Board.

Botany attacks the arbitration award on two levels.

Its main argument is that paragraphs 1 and 2 of the 1966 Agreement constitute an illegal "hot cargo" provision within the meaning of section 8(e) of the Labor Management Relations Act of 1947, 29 U.S.C. § 158(e) [hereinafter referred to as "L.M.R.A."], as amended by the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter referred to as "L.M.R.D.A."]; that the Agreement cannot be enforced; that any attempt by the arbitrator to force compliance with these illegal provisions, thereby requiring the commission of an unlawful act, is in excess of the arbitrator's power; and that the award, therefore, cannot be enforced and must be vacated. <sup>3</sup> / Botany's second line of attack involves the arbitrator's interpretation and construction of the agreement. Succinctly stated, Botany contends that the portion of the arbitrator's award restricting the licensing of the "Botany" trademark is not founded upon the agreement; and therefore, the granting of such an award is in excess of the arbitrator's power.

The Joint Board, on the other hand, maintains that the arbitrator properly construed the 1966 Agreement and that the award, therefore, is not subject to judicial review. However, should the court decide to review the arbitrator's award, the Joint Board contends that the Agreement does not fall within the strictures of section 8(e). In the alternative the Joint

Board argues that even if the language of the Agreement does constitute an illegal "hot cargo" provision, the Agreement is saved by the so-called "garment industry exemption" contained in section 8(e).

#### JURISDICTION AND SCOPE OF REVIEW

The parties have moved to invoke the remedies available to them under the Arbitration Act, 9 U.S.C. §§ 1 et seq.: plaintiff seeks to have the award of Arbitrator Gray vacated pursuant to 9 U.S.C. § 10; and defendant seeks to have the award of Arbitrator Gray confirmed, and enforced, pursuant to 9 U.S.C. § 9. Jurisdiction is predicated upon section 301(a) of the L.M.R.A., 29 U.S.C. § 185(a).

The first problem to be considered is the proper role of the court in reviewing an arbitration award in the context of cross motions to confirm and to vacate the award. The Joint Board contends that the arbitrator properly construed the collective bargaining agreement; that, based upon the teachings of United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), one of the Steelworker's Trilogy, <sup>4/</sup> the award is not subject to judicial review; and that the award should therefore be enforced. Botany, however, in its primary challenge to the award's validity, does not take issue with the arbitrator's construction or interpretation of the agreement. Instead, Botany maintains that the agreement violates section 8(e) of the L.M.R.A.; that the agreement is therefore void and unenforceable; that any attempt by the arbitrator to enforce a void

authority; and that the award cannot be enforced and must be vacated.

Defendant's reliance upon the Enterprise decision for the proposition that a proper construction of a collective bargaining agreement by an arbitrator precludes judicial review is somewhat misplaced. To be sure, the Supreme Court did limit a court's review of the merits of an arbitration award by enunciating a national policy favoring the settlement of labor disputes by arbitration; and by indicating that reviewing courts, in keeping with this national policy, should be guided by the concept of judicial restraint so as not to undermine the arbitral process. However, a brief examination of the Enterprise case should make apparent the fact that the restrictions and guidelines the Supreme Court imposed upon reviewing courts are not applicable to the controversy before this court. In Enterprise, the employer refused to comply with the arbitrator's award. The union sought, and obtained, enforcement of the award in the district court. The court of appeals, to a limited extent, agreed with the district court; but, instead of enforcing the arbitrator's award, it fashioned its own award which significantly modified the arbitrator's award. The Supreme Court reversed the judgment of the court of appeals and sustained the district court's enforcement of the award, <sup>5</sup> stating that "[t]he refusal of courts to review

the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." 363 U.S. at 596 (emphasis added). In so ruling, the Supreme Court found that the basis for the court of appeals' decision was not that the arbitrator had exceeded his authority by failing to draw his award from the essence of the agreement, which would be a proper reason for refusing enforcement, but rather, that the court of appeals "merely disagreed with the arbitrator's construction of [the award]." 363 U.S. at 598. The Supreme Court specifically rejected the attempt by the court of appeals to substitute its own judgment and interpretation of the agreement for that of the arbitrator, stating:

the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

363 U.S. at 599 (emphasis added).

Enterprise is clearly distinguishable from the case at bar. Enterprise involves only one of several grounds for vacating an arbitration award —<sup>6</sup> — an attack upon the arbitrator's judgment -- and its pronouncements are directed to that specific ground. Thus, the Supreme Court was concerned with the review of the merits of an arbitrator's award; and it was concerned with the interpretation and construction of the

collective bargaining agreement. Indeed, the essence of the Court's decision is that an agreement between parties is susceptible to many different interpretations and constructions; and it is the arbitrator's interpretation and construction of the agreement, not a reviewing tribunal's interpretation and construction of the agreement, which should govern the parties' relationship. In the instant case, however, the nature of the attack is quite different-- the award is challenged, not upon its merits, but upon the ground that the underlying agreement violates a federal law and therefore is unenforceable -- and thus the nature of the court's inquiry is also quite different. This court is not concerned with whether the arbitrator has properly construed the collective bargaining agreement, or whether this court agrees with the arbitrator's interpretation of the agreement; but, rather, this court is concerned with whether the collective bargaining agreement and, a fortiori, the arbitration award is capable of being enforced. Indeed, as one court has aptly stated, the court "is concerned with the lawfulness of its enforcing the award and not with the correctness of the arbitrator's decision. Local 985, UAW v. W. M. Chace Co., 262 F.Supp. 114, 117 (E.D. Mich. 1966) (emphasis in original).

Consequently, the court's ability to review the arbitration award presently before it is not constrained by the

specific Enterprise guidelines. However, the question still to be answered, in light of the broader national policy favoring the final settlement of labor disputes by arbitration, is whether a court should review an arbitration award which is attacked upon the theory that the underlying agreement, which the award seeks to enforce, violates the federal labor laws. This court believes that the answer should be in the affirmative.

A fundamental rule of law is that a contract made in violation of a statute is void, Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Waskey v. Hammer, 223 U.S. 85, 94 (1912); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 548 (1902); and unenforceable, Hurd v. Hodge, 334 U.S. 24 (1948).

As the Supreme Court stated in Hurd,

The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

334 U.S. at 34-35 (footnotes omitted). Here, the "private agreement" is between an employer and a labor organization; and the "public policy of the United States" is manifested in the federal labor laws. <sup>7</sup> / The mere fact that the

contract is denominated as a collective bargaining agreement and provides for arbitration as a method of settling labor disputes does not diminish the applicability of this general rule. E.g. Dewey v. Reynolds Metals Co., 300 F.Supp. 709, 713 (W.D. Mich. 1969), rev'd on other grounds 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689 (1971). Indeed, where the validity of the collective bargaining agreement is questioned prior to arbitration, judicial relief is available by way of an action for declaratory judgment. Todd Shipyards Corp. v. Marine and Shipbuilding Workers, Local 39, 232 F.Supp. 589 (E.D.N.Y. 1964), aff'd 344 F.2d 107 (2nd Cir. 1965); Coulon v. Carey Cadillac Renting Co., 231 F.Supp. 991 (S.D.N.Y. 1962). Cf. Black-Clawson Co., Inc. v. Int'l Ass'n of Machinists Lodge 355, 313 F.2d 179 (2nd Cir. 1962). It would make little sense to deny the parties access to the judicial process merely because the action to determine the validity and enforceability of the agreement is commenced after arbitration. If the agreement is void, it is not legitimatized by the arbitral process; and if the agreement is unenforceable, it is not rendered enforceable by an arbitrator's decision. Simply stated, the court cannot enforce an invalid collective bargaining agreement, either directly, in the context of an action for declaratory judgment, or indirectly, by enforcement of the award.

To hold otherwise would undermine the judicial, as well as arbitral, process. By failing to ascertain the enforceability of the agreement, the court would not only be disregarding the Supreme Court's mandate prohibiting the enforcement of agreements violative of public policy, <sup>8/</sup> but it would also be placing itself in the untenable position of giving judicial sanction to an unlawful act by ordering the parties to engage in an activity proscribed by federal statutory law. This the court will not permit, for the court can neither ignore the law nor condone disobedience to the law's commands. Hodgson v. Chain Service Restaurant, Luncheonette and Soda Fountain Employees Union, Local 11, 355 F.Supp. 180 (S.D.N.Y. 1973).

Moreover, an examination of the "applicable legal precedents" involving circumstances similar to the one presented here supports the concept of judicial review of arbitration awards challenged for being founded upon an unenforceable collective bargaining agreement. Thus, for example in Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182 (S.D.N.Y. 1960), an action to confirm and enforce an arbitration award, the court implicitly sanctioned review of arbitration awards which were attacked on the basis of the validity of the underlying agreement. Clarise contended that enforcement of the collective bargaining agreement would cause it to violate

section 302(a) of the L.M.R.A. as amended, 29 U.S.C. § 186(a). The court, without articulating reasons for doing so, reviewed the validity of the agreement and determined that the agreement did not violate section 302(a). And, in International Ladies' Garment Workers' Union, Locals 234 & 243 v. Beauty Bilt Lingerie, Inc., 48 L.R.R.M. 2995 (S.D.N.Y. 1961), the court, again without explanation, ascertained the validity of a collective bargaining agreement in the context of a motion for summary judgment seeking to enforce and confirm an arbitration award.

Courts have also entertained actions in which the challenge is to the legality of the award, not the underlying agreement. In the instant case, it can be said that the parties are attacking the arbitration award as well as the underlying agreement, for, if the underlying agreement violates a positive law, the award seeking to enforce the agreement must necessarily violate the same law. Thus, in Glendale Mfg. Co. v. International Ladies' Garment Workers' Union, Local 520, 283 F.2d 936 (4th Cir. 1960), after the district court directed enforcement of the arbitrator's award without considering the legality of the award, the Fourth Circuit Court of Appeals, realizing that enforcement of the award might "affirmatively order the commission of an unfair labor practice," decided, sua sponte, to review the validity of the award. 283 F.2d at 938. After review, the court's fears were confirmed, and the district court's judgment was vacated. For similar judicial responses, see Local 985, UAW v. W.M. Chace Co.,

262 F.Supp. 114 (E.D. Mich. 1966) (allegation that award would cause the employer to violate Michigan statutory law); Puerto Rico District Council of United Bhd. of Carpenters & Joiners v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D.P.R. 1964) (court held that arbitration decision to the extent it violated Section 302(c)(4) of the L.M.R.A., 29 U.S.C. § 186(c)(4), was not to be enforced). See generally Griffin, "Judicial Review of Labor Arbitration Awards," 4 Suffolk L. Rev. 39, 62-67 (1969); Aaron, "Judicial Intervention in Labor Arbitration," 20 Stanford L. Rev. 41, 53-55 (1967).

Even Enterprise can be read as supporting, rather than inhibiting, review under these conditions. Although the Supreme Court urged courts to enforce arbitration awards without review when the merits of the award are challenged, to hold that this restriction should be extended to include situations in which the issue is the validity of the collective bargaining agreement would be inconsistent with the purpose sought to be accomplished by the Supreme Court. Plainly, it was the Court's desire to prevent the arbitral process from being undermined by excessive judicial interference with the merits of the award. However, if an agreement, banned by Congress were to be enforced by the courts, the entire structure upon which the arbitral process rests would be undermined, thereby thwarting the purpose of the Supreme Court.

Enterprise also buttresses the concept of reviewability to the extent that it not only does not prohibit judicial review, it requires review when the arbitrator's interpretation and construction of the agreement is not founded upon the agreement. Thus, the court declared:

an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597 (emphasis added). Surely, if review is permissible when an arbitrator transcends the boundaries of the agreement, review should be permitted when the agreement itself transcends the boundaries of the law.

Having decided that review of Arbitrator Gray's award is appropriate, it would appear as if the court's task is reduced to ascertaining the validity and enforceability of paragraphs 1 and 2 of the 1966 Agreement. However, because the alleged violation constitutes an unfair labor practice, one other procedural hurdle, one of minor dimensions, must be overcome before the substantive issues can be reached--namely, whether a district court, in the context of cross motions to vacate or to confirm an arbitration award, may determine if a particular activity constitutes an unfair labor practice;

or whether the National Labor Relations Board (hereinafter referred to as the "N.L.R.B.") has exclusive jurisdiction to make such a determination. To state it differently, is the district court, in an action arising under section 301 of the L.M.R.A., precluded by the preemption doctrine from determining if a specified activity constitutes an unfair labor practice? This question has been answered by the Supreme Court in Smith v. Evening News Ass'n, 371 U.S. 195 (1962). There, the action was for breach of a collective bargaining agreement; the conduct involved was concededly an unfair labor practice within the jurisdiction of the N.L.R.B.; the suit was brought pursuant to section 301 of the L.M.R.A.; and the issue was the exclusiveness of the N.L.R.B.'s jurisdiction. The Supreme Court, in specifically rejecting the preemption doctrine, stated

The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301.

371 U.S. at 197. Shortly after Smith was handed down, the Second Circuit recognized the import of the decision, and asserted that "[t]he Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 of the Labor-Management Relations Act." Carey v. General Electric Co., 315 F.2d 499, 508

(2nd Cir. 1963). The court reiterated this concept of concurrent jurisdiction between the courts and the N.L.R.B. in Todd Shipyards Corp. v. Marine and Shipbuilding Workers, Local 39, 344 F.2d 107 (2nd Cir. 1965) aff'g 232 F.Supp. 589 (E.D.N.Y. 1964). In Todd Shipyards, plaintiff instituted an action for declaratory judgment under section 301 alleging that a provision of the collective bargaining agreement violated section 8(e) of the L.M.R.A. The district court, in finding that it had jurisdiction, declared that "[t]he fact that the resolution of the issue may also involve the determination of whether an unfair labor practice has been committed, will not deprive the court of jurisdiction." 232 F.Supp. at 591.

It should be noted that, prior to the demise of the preemption doctrine in suits brought under section 301, courts were not reluctant to exercise jurisdiction over those section 301 proceedings which would require courts, as a basis for resolving the contract dispute, to consider an unfair labor practice allegation. Glendale Mfg. Co. v. International Ladies' Garment Workers' Union, Local 520, 283 F.2d 936 (4th Cir. 1960) (determination of whether enforcement of arbitration award directing an employer to bargain with a union which did not represent the employees would require the commission of an unfair labor practice); Coulon v. Carey Cadillac Renting Co., 231 F.Supp. 991 (S.D.N.Y. 1962)

(declaratory judgment action to determine if clause of collective bargaining agreement violated section 8(e)).

In view of the foregoing, this court concludes that it has jurisdiction to determine the enforceability of Arbitrator Gray's award.

#### HOT CARGO ISSUE

Section 8(e) states, in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be to such extent unenforceable and void . . . ."

The 1966 Agreement between Botany and the Joint Board forbids, except upon consent of the Joint Board, Botany from doing business with any other employer engaged in the production and manufacture of boys', students' and junior clothing. This proscription from doing business with other employers, according to Arbitrator Gray's interpretation of the Agreement, extends to all potential licensees of Botany's trademark.

It would therefore seem that the Agreement is a prima facie violation of section 8(e). The union, however, has propounded two arguments in an attempt to extricate the 1966 Agreement from the statutory interdict on hot cargo agreements. First, the union maintains that the Agreement is

placed outside the reach of the section 8(e) prohibition by the garment industry exemption. Second, the union contends that the agreement involved here is not the type of agreement Congress intended to ban under section 8(e).

In order to properly construe the garment industry exemption, it is necessary to understand the nature of the garment industry, the reason for Congress' special treatment of the industry, and the extent of the garment industry exemption.

As described in the legislative history of the Labor-Management Reporting and Disclosure Act, the garment industry functions under a highly integrated jobber-contractor system of production. The jobber is responsible for the manufacture of the finished garment: he designs the garment, purchases the fabric and other necessary raw materials, and sometimes cuts the fabric in accordance with the design specifications. The pieces are then farmed out, or subcontracted, to other shops, known as contractors and subcontractors, who perform various steps in the manufacturing process, including cutting the fabric (if this has not been done by the jobber), sewing the pieces together, and finishing the garments. The completed product is then returned to the jobber for sale and distribution.

It is this jobber-contractor relationship to which the garment industry exemption is directed. The jobber is an independent business enterprise, having its own employees and its own labor-management relations. Similarly, the contractors and subcontractors, as independent business concerns, operate their own shops. Together they form a single integrated process of production; and, although ostensibly separate and unrelated concerns, they are totally dependent upon each other for their economic existence.

Yet, because the jobber initiates the manufacturing process, and because the contractor relies entirely upon the jobber for its work, a hierarchical structure, with the jobber at the pinnacle, evolved, which lead to abuses during the early days of the garment industry. The jobber doled out work to the lowest bidder, forcing contractors to compete by reducing costs. The net result of this competition was the development of sweatshops in which employees worked for substandard wages under substandard working conditions. Eventually, in order to rid the industry of sweatshops, fairminded employers and labor organizations representing employees entered into agreements whereby the parties agreed not to do business with employers who did not operate under a union contract. Such agreements are typical hot cargo agreements. Thus, when Congress began to consider the prohibition of hot

cargo agreements, the effect of this prohibition upon garment industry practices was discussed. Initial proposals directed at prohibiting hot cargo agreements did not include a special garment industry exemption. <sup>9/</sup> Indeed, House conferees, at <sup>10/</sup> first, opposed the inclusion of this exemption. Industry supporters, however, realizing that such an exemption was necessary to preserve the stability within the garment in-  
<sup>11/</sup> dustry, urged that the exemption be adopted. Ultimately, over protestations that special favors should not be accorded to one industry over another, <sup>12/</sup> Congress carved out, for the garment industry, certain exceptions from the general prohibitory language of section 8(e). But, it is quite clear that Congress intended the exemption to be an extremely limited one, restricted to employers and labor organizations who actively participate in the integrated process.

The Conference Report of the House Managers stated that the statutory language "grant[ed] a limited exemption in three specific situations in the apparel and clothing industry . . . ." These situations, according to Sen. Barry Goldwater, one of the Joint Conferees, arise only

where the relationship between such employer and other employers in said industry--that is, between primary and secondary employers--is that of a jobber, manufacturer, contractor, or subcontractor and where first, the subcontractor performs his work for and on the premises of the contractor, jobber, or manufacturer; or, second, the subcontractor performs his work for and on goods or materials supplied by such contractor, jobber, or manufacturer; or, third, one employer is engaged in an integrated process of production with the other employer. [13]

Thus, for the 1966 Agreement to be immunized from the section 8(e) bar, Botany must be an employer that meets one of these three conditions. Clearly, prior to Botany's acquisition of Levinsohn, Botany did not fall within the garment industry exemption because it did not sell, manufacture or perform, in any way, work on boys', students' and junior clothing; nor was it an employer performing parts of an integrated process which produced such apparel. Equally clear is the fact that Levinsohn, both prior to and subsequent to the Botany acquisition, was, and is, an employer engaged in the creation of boys', students' and junior clothing; and therefore was, and is, outside the reach of the section 8(e) ban. What is not readily apparent is the effect of the Levinsohn acquisition upon Botany's status. To be sure, the acquisition alone, which merely established a parent-subsidiary relationship, did not automatically bring the parent corporation within the very limited section 8(e) exemption. One reason is that the parent-subsidiary relationship is not incor-

porated into the statutory scheme; and a reading of the legislative history reveals no indication that Congress intended to bring this relationship under the umbrella of the exemption. Indeed, because only an employer actively participating in the garment industry integrated process is exempt from the hot cargo prohibition, and because majority ownership of a corporation's stock does not, *per se*, transform a parent company into such an employer, the parent-subsidiary relationship should not be added to the section 8(e) exemption. Assuming, however, that section 8(e) should be amended to include this relationship, the change must be made by the legislature and not by the courts.

A second reason is that both the courts and the N.L.R.B. have consistently held that evidence of common ownership, without more, is insufficient to warrant the conclusion that two ostensibly separate employers have merged into a single employer subject to the provisions of the L.M.R.A. <sup>14/</sup> To effectuate this merger, "something more" than common ownership is needed "in the form of common control, as it is usually phrased, denoting actual, as distinguished from merely potential, integration of operations and management policies." <sup>15/</sup>

The criteria applied by the N.L.R.B. in determining whether sufficient integration of operations exists so as to create the requisite actual control are interrelation of operations, common management, centralized control of labor relations and common ownership or financial control. N.L.R.B. Twenty-first Ann. Rep. 14-15 (1956); cf. Radio & Television Broadcast Technicians Local 1264, IBEW v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965) (per curiam). The Board, in its Twenty-first Annual Report, stated that "[n]o one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show 'operational integration,' particularly centralized control of labor relations."

Applying the Board criteria to the Botany-Levinsohn relationship, the following facts emerge. Levinsohn is a separate and distinct entity and not part of any integrated process of manufacture with Botany. Levinsohn is independently operated by a group of officers (only two of whom are officers of Botany) who are responsible for all the Levinsohn operations. Levinsohn totally controls its entire manufacturing process: it purchases its own raw materials and converts them into finished garments through its own integrated process; it conducts its own advertising, sales and distribution program through sales and shipping departments which are in no way

related to Botany; it maintains its own employment and personnel policies; it keeps its own business records; and, in general, it is responsible for the day-to-day operations of the manufacture and production of boys', students' and junior clothing. Levinsohn's financial relationship to Botany is, as a subsidiary, to account for profits and losses; and, as a licensee under the 1963 Agreement, to pay royalties on goods bearing the Botany label. Finally, the parent does not, in any manner, control or participate in either the overall or the daily labor relations of its subsidiary. Levinsohn pursues its own labor relations policy and maintains its own collective bargaining agreement with the Joint Board. Botany, on the other hand, takes no active role in the production, manufacture or sale of boys', students' and junior clothing; nor functions as a jobber, manufacturer, contractor or subcontractor within the Levinsohn integrated process. Nor is Botany involved in the daily operations of Levinsohn. In fact, Botany's sole involvement with the production, manufacture or sale of Levinsohn produced garments stems from the 1963 licensing garment which remained in effect after the 1966 acquisition and which is limited to garments sold under the Botany trademark. As to these garments, Botany controls the quality and limits the retail establishments to which they can be sold; but, as to garments

which either fail to meet the Botany standards (and are thus sold without a Botany label), or are not manufactured for sale under the Botany name, there are no restrictions. This licensing agreement, however, which was insufficient prior to acquisition to imbue in Botany the type of control necessary to merge two entities into one, is equally insufficient after acquisition to consummate the same merger.

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In sum, it is clear that, while Botany has sufficient ownership interest to control Levinsohn's operations, it does not do so. And, so long as Botany's control remains potential, Botany and Levinsohn cannot be considered a single employer. Consequently, it cannot be said that Botany is an employer within the garment industry exemption. Botany is not a jobber, manufacturer, contractor or subcontractor of boys', students' or junior clothing; it does not work on goods of a jobber, manufacturer, contractor or subcontractor engaged in the production of such clothing; it does not work on the premises of a jobber, manufacturer, contractor or subcontractor engaged in the production of such clothing. It is not even involved in the specific subject area to which the exemption is directed: labor relations in the integrated process of production. Therefore, the agreement between Botany and the Joint Board is not protected by the garment industry exemption.

The union also attempts to avoid the impact of section 8(e) by arguing that the agreement is not the type Congress sought to eliminate by enacting the section. This argument is predicated upon the fact that some courts have rejected a literal reading of the statute, which would impose an absolute ban on all hot cargo agreements, and have validated certain agreements which would otherwise be outlawed by section 8(e).

National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612 (1967)

(work preservation clause); Truck Drivers Union, Local 413 v. N.L.R.B., 334 F.2d 539 (D.C. Cir.), cert. denied 379 U.S. 916 (1964) (union standards clause). The union claims that the agreement represents a work preservation clause and is therefore excepted, under National Woodwork Mfrs. Ass'n, supra, from the operation of section 8(e). The argument is unpersuasive.

In National Woodwork Mfrs. Ass'n, the Supreme Court held that section 8(e) does not prohibit agreements designed to preserve, for employees of a bargaining unit, work traditionally performed by those employees. To make this determination, an inquiry must be made "into whether, under all surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the

contracting employer vis-a-vis his own employees." Id. at 644-645 [footnotes omitted].

An examination of the facts of National Woodwork Mfrs. Ass'n serves to illustrate the scope of work preservation agreements. There, a general contractor on a housing project was subject to the provisions of a collective bargaining agreement which contained the following restriction: "No member of this District Council [of the United Brotherhood of Carpenters and Joiners of America] will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . . ." Notwithstanding this provision, the general contractor ordered precut and prefitted doors from a manufacturer who was a member of plaintiff association. After the doors arrived at the job site, the union ordered its members not to hang them. The general contractor thereupon returned the prefabricated doors and replaced them with unfinished doors which were to be finished by carpenters on the job site. Subsequently, plaintiff association filed with the N.L.R.B. unfair labor practice charges against the union, alleging, inter alia, that the contract provision violated section 8(e). The Supreme Court, in rejecting plaintiff's argument, found that the cutting and fitting of the unfinished doors were "tasks traditionally performed . . . by the carpenters employed on the jobsite," id. at 615-616; and that the object of the agreement was to protect the employees

from losing work they had traditionally done.

Turning to the facts of the instant case, it cannot be said that the agreement is work-preservative. The most obvious shortcoming of the 1966 Agreement is that it is not "addressed to the labor relations of the contracting employer vis-a-vis his own employees." The labor relations which are the subject of the Joint Board's professed concern, and which are within the Supreme Court's formulation, are between an employer and its employees (and, to the extent applicable, its contractors and subcontractors) who are involved in the integrated process of production of boys', students' and junior clothing. As already discussed, Botany is not a part of this integrated process; nor is it involved in the labor relations of the integrated process. Therefore, the agreement is not to preserve the work of the employer's own employees.

Furthermore, notwithstanding the union's contention that its objective was to prevent Levinsohn from moving, <sup>17/</sup> and is thus work-preservative, the language of the Agreement belies this contention and clearly indicates that the Agreement was "tactically calculated to satisfy union objectives elsewhere." The agreement forbids Botany to deal with any manufacturer of boys', students' and junior clothing unless that manufacturer operates under a collective bargaining agreement with the Joint Board. A similar restriction is placed upon

Botany's ability to license its trademark. Neither of these conditions involves Levinsohn employees or persons performing parts of Levinsohn's integrated process or work traditionally performed by Levinsohn employees. Rather, they are directed towards Botany's relations with integrated processes, contractors, subcontractors, employers and employees who are totally divorced and unrelated from the Levinsohn operation. These factors plainly reveal the true intent underlying the agreement: to preserve work to the union as a whole and not the bargaining unit. <sup>18/</sup> Indeed, if the union was actually interested in preserving the jobs traditionally performed by Levinsohn employees, the Agreement between it and Botany would have been limited only to the Levinsohn operation and would not have been so broad as to envelop the entire boys', students' and junior clothing subdivision of the garment industry.

Consequently, the Agreement is not saved by this judicially created exception to the ban on hot cargo agreements. Thus, having determined that the Agreement is void and unenforceable, it is obvious that the award which attempts to enforce the Agreement is likewise unenforceable. It is therefore unnecessary for this court to explore Botany's secondary line of attack which is directed to that portion

of the award which restricts the licensing of the "Botany" trademark.

Accordingly, the award of Arbitrator Gray is hereby vacated.

So ordered.

Dated: New York, N. Y.  
April 12, 1974

David N. Edelstein  
David N. Edelstein  
Chief Judge

FOOTNOTES

1/ See letter of January 5, 1971 from plaintiff's attorneys to Arbitrator Gray, Exhibit 5, Notice of Motion, 71 Civ. 2381 (S.D.N.Y. May 27, 1971).

2/ The award of Arbitrator Gray is as follows:

1. Under date of November 1st, 1966 Botany Industries, Inc. entered into a written agreement with the New York Joint Board of the Amalgamated Clothing Workers of America, which agreement was in full force and effect at all of the times herein mentioned and is to continue so in force and effect until termination date, to wit, June 1st, 1981;

2. By the terms of the aforesaid agreement Botany agreed not to engage in the manufacture of boys', students', or Junior clothing, either directly in a manufacturing facility owned and operated by itself, or in a manufacturing facility owned or operated by one of its subsidiaries or by any other company which it either owns or controls, or indirectly in any other form, unless such manufacturing facility operates under collective agreement with the Joint Board, that is, among other things, it is physically located within the geographic jurisdiction of the Joint Board.

3. By the terms of the aforesaid agreement Botany further agreed that the word "Botany" would be used in connection with the manufacture, sale or other disposition of boys', students', or Junior clothing only if such clothing were manufactured in a manufacturing facility owned and operated by itself, or by one of its subsidiaries, or by another company which it either owns or controls, and which said manufacturing facility was being operated under the terms of a collective agreement with the Joint Board;

4. Botany should be and it hereby is directed not to sell or license and not to agree to sell or license the word "Botany" or any symbol or mark which contains this word for use in connection with the manufacture, sale or other disposition of any boys', students', or Junior clothing which is not being manufactured or has not been manufactured in a manufacturing facility owned and operated by Botany or by one of its subsidiaries, or by another company which it owns or controls, and which manufacturing facility was or is operated under the terms of a collective agreement with the Joint Board; and Botany is further directed not to permit or to agree to permit the use of the word "Botany" in any other way whatsoever in connection with clothing of the kinds hereinabove named unless such clothing has been or is being manufactured in a manufacturing facility as hereinabove described;

5. By the terms of the aforesaid agreement Botany further agreed during the effective term of the agreement, to wit, until June 1st, 1981, to continue to manufacture boys', students', and Junior clothing in a manufacturing facility owned or controlled by it, or on its behalf by its own subsidiary or by a company owned or controlled by it, which facility is operated under collective agreement with the Joint Board.

In re Botany Industries, Inc. (New York, February 23, 1971) at 9-10 [unpublished arbitration award annexed as Exhibit 6 to Notice of Motion, 71 Civ. 2381 (DNE) (S.D.N.Y. May 27, 1971)] [hereinafter referred to as In re Botany Industries].

<sup>3/</sup> Botany raised this contention during the course of the arbitration proceedings. The arbitrator, however, refused to entertain Botany's contention, claiming that he did not have the power to administer the Labor Act. In re Botany Industries, supra, n. 2, at 7-8.

4/ In 1960, the Supreme Court decided three cases involving the function of courts vis-a-vis the arbitration process. These cases, commonly referred to as the Steelworker's Trilogy, are United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

5/ The Supreme Court, however, modified the judgment of the district court to the extent it was necessary to correct an ambiguity in the arbitrator's award. The arbitrator had ordered that certain employees should be reinstated with back pay, but neglected to determine the amounts due the employees. The Supreme Court directed that this determination should be made by the arbitrator.

6/ An award may be vacated on the grounds that there was fraud, partiality or other misconduct on the part of the arbitrator (e.g. Commonwealth Castings Corp. v. Continental Coatings Co., 393 U.S. 145 (1968)); that the award was based upon manifest disregard of the law (e.g. Trafalgar Shipping Co. v. Int'l Milling Co., 401 F.2d 568 (2nd Cir. 1968); Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577 (2nd Cir. 1967)); or that the award violates public policy (e.g. Electrical, Radio & Machine Workers, Local 453 v. Otis Elevator Co., 314 F.2d 25 (2nd Cir.), cert. denied. 373 U.S. 949 (1963); Glendale Mfg. Co. v. Int'l Ladies' Garment Workers, Local 520, 283 F.2d 936 (4th Cir. 1960)).

7/ The Second Circuit Court of Appeals, citing Hurd, has stated:

It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States. \* \* \* " Hurd v. Hodge, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-853, 92 L.Ed. 1187 (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts, under the mandate of Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957), are empowered to fashion.

Electrical, Radio & Machine Workers, Local 453 v. Otis Elevator Co., 314 F.2d 25, 29 (2nd Cir.), cert. denied, 373 U.S. 949 (1963).

8/ In Metal Product Workers, Local 1645 v. Torrington Co., 358 F.2d 103 (2nd Cir. 1966), the Second Circuit, quoting Electrical Radio & Machine Workers, Local 453 v. Otis Elevator Co., 314 F.2d 25, 29 (2nd Cir.) cert. denied, 373 U.S. 949 (1963), stated:

"[W]hen public policy is sought to be interposed as a bar to enforcement of [or as a reason to vacate] an arbitration award, a court must evaluate its asserted content."

358 F.2d at 106 (emphasis added; brackets in original).

9/ See, e.g. section 106 of the Kearns Bill, H.R. 7265, 86th Cong., 1st Sess. § 106 (1959) as contained in I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter referred to as I Leg. Hist.] 586, 595; section 705 of the Landrum Bill, H.R. 8400, 86th Cong., 1st Sess. § 705 (1959) as contained in I Leg. Hist. at 619, 683. See also the Elliott Bill, H.R. 8342 86th Cong., 1st Sess. § 705 (1959) as contained in I Leg. Hist. at 687 which was adopted by the House. Rep. Thompson, in discussing the difference between the House and Senate versions, noted that agreements in the garment industry were vulnerable to the ban on hot cargo agreements. II Legislative History of the Labor-Management Reporting Act of 1959 [hereinafter referred to as II Leg. Hist.] at 1708.

10/ According to Rep. Thompson, a joint conference committee member, House conferees opposed the garment industry exemption for two weeks. Remarks of Rep. Thompson, II Leg. Hist. at 1721.

11/ See, e.g., remarks of Sen. Javits, II Leg. Hist. at 1384-1385, 1387; Sen. Kennedy, II Leg. Hist. at 1194-1195, 1377; Rep. Teller, II Leg. Hist. at 1680; Rep. Thompson, II Leg. Hist. at 1708; Rep. Halpern, II Leg. Hist. at 1736-1737. See also Analysis of Landrum-Griffin Labor Reform Bill by Representatives Thompson and Udall, II Leg. Hist. at 1576.

12/ See, e.g. remarks of Reps. Roosevelt and Dent, II Leg. Hist. at 1729, 1732.

13/ Remarks of Sen. Goldwater, II Leg. Hist. at 1857.

14/ For illustrations of situations involving the question of whether two separate employers are a single employer under the labor laws, see Bachman Machine Co. v. N.L.R.B., 266 F.2d 599 (8th Cir. 1959); J. G. Roy & Sons v. N.L.R.B. 251 F.2d 771 (1st Cir. 1958); Television and Radio Artists, Washington-Baltimore Local, 185 N.L.R.B. 593 (1970); Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303 (1970); Okeh Caterers, 179 N.L.R.B. 535 (1969); Senco, Inc., 177 N.L.R.B. 882 (1969); Miami-Newspaper Printing Pressman, Local 46, 138 N.L.R.B. 1346 (1962), enf'd sub nom Miami Newspaper Pressmen's Local v. N.L.R.B., 322 F.2d 405 (D.C. Cir. 1963). See also Marlene Industries, 166 N.L.R.B. 703, enf'd sub nom Decaturville Sportswear Co. v. N.L.R.B., 406 F.2d 886 (6th Cir. 1969) in which the Board found that a parent and its several subsidiaries constituted an integrated process of production. Marlene is distinguished from the instant case because the parent and subsidiary do not form an integrated process of production.

15/ Miami Newspaper Pressmen's Local v. N.L.R.B., 322 F.2d 405, 409 (D.C. Cir. 1963), enf'g Miami Newspaper Printing Pressman, Local 46, 138 N.L.R.B. 1346, 1347-8 (1962). See also the Board's decision in Darlington Mfg. Co., 139 NLRB 241, 255 (1962), enforcement denied sub nom Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 54 LRRM 2499 (4th Cir. 1963) vacated and remanded, sub nom, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965), Darlington Mfg. Co. 160 NLRB No. 100, 65 LRRM 1391 (1967) enforced sub nom Darlington Mfg. Co. v. NLRB, 397 F.2d 760, 68 LRRM 2356 (4th Cir. 1968), cert. denied, 393 U.S. 1023, 70 LRRM 2225 (1969).

16/ Majority stock ownership in a corporation has been held to be sufficient to fulfill the Board's requirement for finding common ownership. Darlington Mfg. Co., 139 N.L.R.B. at 255-256.

17/ Affidavit of Louis Hollander in Opposition to Motion to Vacate Arbitration Award, 71 Civ. 2381 (D.N.E.) (S.D.N.Y. June 7, 1971). It should be noted that the union's reasons for requesting arbitration are different from the purpose sought it to accomplish by entering into the Agreement. The request for arbitration was based upon a report that the Levinsohn operation was to be closed down; yet, the Agreement was not intended to cover this situation, but rather, it was to cover runaway shops.

Although the issue involving the closing of an employer's business is not before this court, it is questionable whether the Levinsohn operation can be prevented from entirely shutting down. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); Hoh v. Pepsico, Inc., No. 74-1151 (2nd Cir., Feb. 8, 1974).

18/ Union signatory agreements (as opposed to union standards or work preservation agreements), which preserve work for the union as a whole, do not come within the exceptions to section 8(e). Truck Drivers Union, Local 413 v. N.L.R.B., 334 F.2d 539 (D.C. Cir.), cert. denied 379 U.S. 916 (1964); Orange Belt District Council of Painters, Local 48 v. N.L.R.B. (D.C. Cir. 1964); Painters Local 1937 (Prince George's Center, Inc.), 183 N.L.R.B. No. 6 (1970); Painters Local 823, 161 N.L.R.B. 620 (1966).

NOTICE OF APPEARANCE (Filed May 10, 1974)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

152a

Filed U.S. Dist Ct  
May 10, 1974  
S.D.N.Y.

-----X

BOTANY INDUSTRIES, INC.,

Plaintiff,

FILE NO. 71 CIV  
2381 (DNE)

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

NOTICE OF  
APPEARANCE

Defendant.

-----X

S I R S:

PLEASE TAKE NOTICE, That the defendant, NEW YORK  
JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, hereby  
appears in the above entitled action, and that the undersigned  
have been retained as Attorneys for said Defendant and demand  
that all papers in this action be served upon the undersigned  
at the office and post office address stated below.

New York, N.Y.

Yours, etc.

Dated: May 9, 1974

JACOB SHEINKMAN  
ARTHUR M. GOLDBERG  
15 Union Square  
New York, New York 10003  
Tel. (212) 255 - 7800  
and  
SZOLD, BRANDWEIN, MEYERS & ALTMAN  
30 Broad Street  
New York, New York 10004  
Tel. (212) 422 - 1777

Irving J. Alter

By: Irving J. Alter  
A Member of the Firm  
Co-attorneys for Defendant,  
NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA

TO: WEIL, GOTSHAL & MANGES  
Attorneys for Plaintiff  
767 Fifth Avenue  
New York, N.Y. 1022

NOTICE OF APPEAL (Filed May 10, 1974)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

153a

filed  
U.S. Dist. Ct.  
May 10, 11:11 AM '74  
S.D.N.Y.

-----X BOTANY INDUSTRIES, INC., :

Plaintiff, : FILE NO. 71CIV  
2381(DNE)

-against- :

NOTICE OF APPEAL

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA, :

Defendant.

-----X

Notice is hereby given that NEW YORK JOINT BOARD,  
AMALGAMATED CLOTHING WORKERS OF AMERICA, Defendant above  
named, hereby appeals to the United States Court of Appeals  
for the Second Circuit from the opinion and order # 40583,  
dated April 12, 1974, made by United States Chief District  
Court Judge David N. Edelstein vacating the arbitration award  
of Herman Gray.

New York, N.Y.

Dated: May 9, 1974

JACOB SHEINKMAN  
ARTHUR M. GOLDBERG  
15 Union Square  
New York, New York 10003  
Tel. (212) 255-7800  
and  
SZOLD, BRANDWEN, MEYERS & ALTMAN  
30 Broad Street  
New York, New York 10004  
Tel. (212) 422 - 1777

Irving J. Alter  
By: Irving J. Alter,  
A Member of the Firm  
Co-attorneys for Defendant,  
NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA

TO: WEIL, GOTSHAL & MANGES,  
Attorneys for Plaintiff  
767 Fifth Avenue  
New York, N.Y. 10022

154a

ORIGINAL

AO Form No. 82-Rev.  
Form approved by  
Comp. Gen., U. S.  
June 26, 1953.

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK  
OFFICE OF THE CLERK

NEW YORK CITY

RECEIVED  
FROM

L. Alter

DATE

5/10/74

Docket No.	(Pl.)	(Def.)
AL 2381	Battery 2d.	N.Y. Joint Bond
DNE		

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
Clerks Fees	Offical 5	Registry	
Bankruptcy Filing Fee		Cash Bail	
Referee's Sal. and Exp. Fund		Tender	
Miscel. Earnings Copy		Seaman's Wages	ACCT. NO. 2
Certificate		Unpaid Dividends In Bankruptcy	ACCT. NO. 3
Search		Other Moneys	
		Costs	
		Fine	
Nat'zn Fees Pat. Nos.			

Decl. Nos.

Total ►

DEPUTY CLERK

Gibbons

35906

Cash  Check  MONEY ORDER

CLERK'S CERTIFICATE (Dated June 19, 1974) 155a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

BOTANY INDUSTRIES, INC.,

Plaintiff,

71 Div. 2381  
(DNE)

-against-

NEW YORK JOINT BOARD, AMALGAMATED  
CLOTHING WORKERS OF AMERICA,

CLERK'S  
CERTIFICATE

Defendant.

-----X

I, Raymond F. Burghardt, Clerk of the  
District Court of the United States for the Southern District  
of New York, do hereby certify that the certified extract  
of docket entries lettered A<sup>B</sup> and the original filed  
papers numbered 1 through <sup>11</sup><sub>8</sub>, inclusive, constitute the  
record on appeal in the above-entitled proceedings.

IN TESTIMONY WHEREOF, I have caused the seal of  
the said Court to be hereunto affixed, at the City of  
New York in the Southern District of New York, this 19<sup>th</sup>  
day of June, in the year of our Lord, One Thousand Nine  
Hundred and Seventy-four, and of the independence of the  
United States the One Hundred Ninety-Eighth.

15/ Raymond F. Burghardt  
CLERK OF THE COURT

UNITED STATES COURTS OF APPEALS: SECOND CIRCUIT *Index No.*

MAX ROBB

Plaintiff-Appellee

against

NEW YORK JOINT BOARD, AMALGAMATED

Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.

I, James Steele, being duly sworn,  
 deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York  
 That on the 30th day of August 1974 at 767 5th Ave., New York

deponent served the annexed *Offer of Judgment* upon

Weil, Gotshal & Manges

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 30th  
 day of August 1974

*James Steele*  
 Print name beneath signature

JAMES STEELE

*Robert T. Brin*  
 ROBERT T. BRIN  
 NOTARY PUBLIC, STATE OF NEW YORK  
 NO. 31 - 0418950  
 QUALIFIED IN NEW YORK COUNTY  
 COMMISSION EXPIRES MARCH 30, 1975

